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No. 10-____

IN THE

Supreme Court of the United States

FOUNDATION OF HUMAN UNDERSTANDING,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What is the appropriate legal test to be applied in determining whether a religious organization qualifies as a "church" under sections 170 and 509 of the Internal Revenue Code ("the Code"), 26 U.S.C. §§ 170(b)(1)(A)(i) and 509(a)(1)?

2. To the extent that a church must possess an associational element by which its followers are brought together to worship, can radio and/or Internet broadcasts, during which followers can call in or otherwise communicate with clergy, satisfy, in whole or in part, this associational element?

RULE 14.1(b) STATEMENT – PARTIES

The following were parties to the proceedings in the United States Court of Appeals for the Federal Circuit:

Foundation of Human Understanding, Plaintiff-Appellant/Petitioner on Review.

The United States, Defendant-Appellee/Respondent on Review.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The Foundation for Human Understanding is a nonprofit corporation. There is no parent corporation or publicly held corporation owning 10% or more of the stock of Petitioner Foundation for Human Understanding.

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PETITION FOR A WRIT OF CERTIORARI

The Foundation of Human Understanding ("the Foundation") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Federal Claims granting summary judgment to the government, and denying the Foundation's cross-motion for summary judgment, on the grounds that the Foundation did not qualify as a "church" under relevant provisions of the Internal Revenue Code (26 U.S.C.) ("the Code") is published at 88 Fed. Cl. 203 (2009).

App., *infra* 2a-73a. The United States Court of Appeals for the Federal Circuit ("Court of Appeals"), in a published opinion reported at 614 F.3d 1383 (Fed. Cir. 2010), affirmed the decision of the Court of Federal Claims. App., *infra* 74a-86a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 16, 2010. The jurisdiction of the United States Supreme Court is invoked in a timely manner under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Pertinent portions of the statutes at issue, 26 U.S.C. § 170 and 26 U.S.C. § 509, are set forth at App., *infra* 87a-93a.

STATEMENT OF THE CASE

This case presents an important, but unsettled, question under the federal tax code which this Court should definitively resolve: What is the proper definition of the term "church"? The determination of church status carries with it important protections unavailable to other religious organizations. For example, churches are not required to file informational tax returns with the Internal Revenue Service (the "IRS") under 26 U.S.C. § 6033 and the IRS may investigate churches only in accordance with the strict and specific procedures set forth in 26 U.S.C. § 7611. Because of these and other important protections, a clear definition of the term "church" that is free from value-based inquiries into the organization's religious beliefs and practices is required.

Previously-articulated tests advanced by the IRS and the courts pose constitutional concerns and have resulted in inconsistent conclusions. Furthermore, it is unclear which, if any, of these tests is appropriate to apply. In this case the Court of Appeals adopted the so-called "associational test" for determining church status, which requires that "a church's principal means of accomplishing its religious purposes must be to assemble regularly a group of individuals related by common worship and faith." *See* App., *infra* 82a, quoting *Church of Eternal Life & Liberty, Inc. v. Comm'r*, 86 T.C. 916, 924 (1986).

In applying this associational test, the Court of Appeals discounted completely the fact that, in addition to more traditional in-person religious services at the Foundation's Tall Timber Ranch near Selma, Oregon and elsewhere, during which the Foundation's congregants physically assembled, the Foundation also engaged in an extensive electronic ministry. That electronic ministry enabled followers to regularly gather around radios and the Internet to receive the Foundation's religious message and interact by telephone with the Foundation's clergy. The Court of Appeals ruled, as a matter of law, that such a "broadcast" ministry "does not provide individual congregants with the opportunity to interact and associate with each other in worship, and it therefore does not provide a basis for concluding that the Foundation's religious activities satisfied the associational test." App, *infra* 86a. Thus, despite the Foundation's conduct of in-person religious services along with its electronic ministry, the Court of Appeals held that the Foundation did not qualify as a church. *Id.*

The Court of Appeals' opinion that a "broadcast" ministry cannot be associational betrays a preference

for traditional "brick and mortar" churches, while ignoring modern technological advances and the expanding efforts by many recognized churches to utilize technology, including the Internet, to reach, interact with, and minister to their followers. Rather than discounting a religious organization's efforts and activities to communicate with its congregants through modern means, and focusing on more familiar in-person services during which congregants physically assemble, this Court should instead adopt a "totality of the circumstances" test for determining church status that focuses on the religious organization's dissemination of its religious message and the acceptance of that message by followers who receive and acknowledge it as being relevant to their spiritual development.

Application of such a test rigorously protects First Amendment religious values by eliminating governmental tendencies to engage in culturally biased inquiries into a religious organization's religious beliefs, customs and practices based on archetypal views of how a "traditional" church should worship or disseminate its message. Such a test appropriately considers all means by which a church and its followers communicate and worship, including those provided by modern technology, and avoids a cramped and restrictive view which only values stereotypical images of religious activity.

1. Factual Background Regarding the Foundation's Prior Church Status. The Foundation is a California non-profit corporation that was first incorporated in 1963. F.C. App. 3605.[1] On December

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[1] The appendix filed by the Foundation in the Federal Circuit Court of Appeals is cited herein as "F.C. App."

20, 1965, the IRS recognized the Foundation's tax-exempt status under 26 U.S.C. § 501(c)(3), and characterized the Foundation's purposes as religious and educational. *Id.* The Foundation's founder, and its president from the date of its incorporation to the present, is Roy Masters, who has been teaching his Judeo-Christian beliefs throughout the United States since 1961. *Id.*

In 1970 the Foundation filed with the IRS Treasury Form 4653, "Notification Concerning Foundation Status," in which it gave notice that it was not a private foundation but was rather a "church" under 26 U.S.C. §§ 509(a)(1) and 170(b)(1)(A)(i) and "[a]n organization that normally receives no more than 1/3 of its support from gross investment income and more than 1/3 of its support from contributions, membership fees, and gross receipts from activities related to its exempt funds" under 26 U.S.C. § 509(a)(2). *Foundation of Human Understanding v. Comm'r*, 88 T.C. 1341, 1343 (1987) ("*Foundation I*"). By letter dated October 20, 1970, the IRS notified the Foundation that it was not considered a "private foundation," but the IRS failed to state whether this status was based upon an administrative determination that the Foundation was a church under Section 509(a)(1) or a publicly supported organization under Section 509(a)(2). *Id.* at 1343.

On May 15, 1972, the Foundation amended the "purpose" clause contained in its articles of incorporation to unequivocally state that, in fact, it was a church. F.C. App. 3606. The Foundation's articles of incorporation have been amended several times since and have continuously stated that the Foundation is a church. F.C. App. 310-319.

The IRS resisted the Foundation's entitlement to church status and, on February 23, 1983, issued its final determination letter stating that, while the Foundation was a "religious and educational organization," it was "not a church as that term is commonly understood." F.C. App. 3606-07. In response to that determination, the Foundation filed a declaratory judgment action in the United States Tax Court (the "Tax Court") seeking a judicial determination of its status as a church under the Code. F.C. App. 3607.

On May 19, 1987, the Tax Court issued its decision in *Foundation I*, holding that the Foundation qualified as a church for the tax years in question within the meaning of 26 U.S.C. § 170(b)(1)(A)(i). *Foundation I*, 88 T.C. at 1361. The Tax Court found that the Foundation had, since its inception, spread its religious message through radio presentations. *Id.* at 1345. After its incorporation in 1963, the Foundation began conducting a live radio show hosted by Roy Masters "using a call-in format whereby listeners telephone Masters with their questions, concerns, and problems, and he responds with counseling in keeping with his doctrine and teachings." *Id.* The Tax Court found that, at one point, these radio presentations, including taped replays, were broadcast five or six days a week over numerous radio stations with an estimated audience of "approximately 2 million with a regular following of 30,000." *Id.* at 1346. The Tax Court also noted the Foundation's significant publishing activities, which included the distribution of pamphlets, books, taped recordings of its live call-in radio shows, and a magazine which had 5,200 subscribers and an estimated readership of 15,000. *Id.*

In addition to its radio and publishing activities, the Tax Court found that the Foundation conducted regular religious services at two of its locations. The Foundation conducted services three or four times a week which were open to the public at a building that it owned in Los Angeles, California. *Id.* at 1347. Additionally, the Foundation owned a building in Grants Pass, Oregon, in which religious services were also conducted. "Attendance at services at both Grants Pass and Los Angeles ranges from 50 to 350 people." *Id.* at 1348. The Tax Court also found that the Foundation operated a school for children that included both general education and religious instruction. *Id.* Additionally, the Foundation operated the Tall Timber Ranch in Selma, Oregon, at which it conducted various meetings and seminars. *Id.*

In determining whether these facts supported the conclusion that the Foundation was a church, the Tax Court first noted the absence of any "guidance by Congress" or any "meaningful regulatory definition" of the term. *Id.* at 1356. The Tax Court also recognized that interpreting the term "in light of the generally accepted meaning and usage of the word" was unacceptable "given the plurality of religious beliefs in this country." *Id.* In this regard, the Tax Court stated:

> We can only approach this question with care for all of us are burdened with the baggage of our own unique beliefs and perspectives. We must recognize that one person's prophet is another's pariah. Consequently, we must also assiduously avoid expanding our inquiry into the merits of petitioner's beliefs or risk running afoul of First Amendment religious protections.

Id. at 1356-57. Therefore, instead of focusing on the merits of the Foundation's religious beliefs, the Tax Court concluded that the "means by which an avowedly religious purpose is accomplished separates a 'church' from other forms of religious enterprise." *Id.* at 1357. The Tax Court concluded that, "[a]t a minimum, a church includes a body of believers or communicants that assembles regularly in order to worship." *Id.*

In its effort to determine whether the Foundation in fact qualified as a church under this standard, the Tax Court discussed, but expressly did not adopt as a legal test, fourteen criteria which the IRS had informally announced for determining church status. These criteria were (1) a distinct legal existence; (2) a recognized creed and form of worship; (3) a definite and distinct ecclesiastical government; (4) a formal code of doctrine and discipline; (5) a distinct religious history; (6) a membership not associated with any other church or denomination; (7) an organization of ordained ministers; (8) ordained ministers selected after completing prescribed studies; (9) a literature of its own; (10) established places of worship; (11) regular congregations; (12) regular religious services; (13) Sunday schools for religious instruction of the young; and (14) schools for the preparation of its ministers. *Id.* at 1357-59. *See* Internal Revenue Manual 7(10)69, *Exempt Organizations Examination Guidelines Handbook* 321.3(3) (Apr. 5, 1982). Significantly, these criteria have never been adopted by statute or regulation, and no court considering the issue has ever acknowledged them as being authoritative on the issue of church status.

Nonetheless, citing these factors as helpful to its analysis, the Tax Court found that the Foundation

had a distinct religious history of more than twenty years and "possess[ed] most of the [IRS] criteria to some degree." *Id.* at 1360. The Foundation had a distinct legal existence and its Judeo-Christian principles, which emphasized "emotional self-control through a specific type of meditation as the key to salvation" set it "apart from other recognized religions." *Id.* at 1359. The Tax Court also concluded that the Foundation conducted "regular meetings of regular congregations at established places of worship" which were open to the public and which were conducted by its ordained ministers. *Id.*

The Tax Court acknowledged that the Foundation reached "far more people with its message of emotional self control through its radio broadcasts, books, pamphlets, and magazine" than it did with its in-person services, 30,000 to 2 million people through the former as opposed to 50 to 350 people through the latter. *Id.* at 1360. However, the Tax Court stated:

> Nevertheless, petitioner's substantial broadcasting and publishing activities do not overshadow the other indications that petitioner is a church. The call to evangelize or otherwise spread one's religious beliefs is, undeniably, an integral part of many faiths. The fact that in this case, the religious outreach was substantial both before and after petitioner began to possess many church-like characteristics does not change our conclusion. More importantly, despite the breadth of petitioner's broadcasting and publishing efforts, its associational aspects are much more than incidental.

Id. at 1360-61.

As a result of the Tax Court's decision in *Foundation I*, the IRS issued a Determination Letter to the Foundation on October 22, 1987, stating that, for periods after February 23, 1982, the Foundation qualified as a church under 26 U.S.C. §§ 509(a)(1) and 170(b)(1)(A)(i).

2. The Court of Federal Claims Proceeding. The Foundation's church status continued unimpeded until October 16, 2001, when the IRS commenced an audit of the Foundation's tax status for the tax years 1998, 1999, and 2000 ("the tax years at issue"). F.C. App. 67. For the most part, the audit consisted of approximately one hundred Information Document Requests submitted by the IRS over the course of more than two years in which it requested documents and other information from the Foundation. *See, e.g.*, F.C. App. 1046-54.

The audit of the Foundation culminated in the issuance by the IRS of a Technical Advice Memorandum dated June 8, 2004, in which the IRS concluded that the Foundation was a publicly-supported charity that was exempt from taxation as an organization described in 26 U.S.C. § 501(c)(3), but was not a church under 26 U.S.C. §§ 509(a)(1) and 170(b)(1)(A)(i) for the tax years at issue. F.C. App. 1523-1576. The IRS revoked the Foundation's church status, retroactive to January 1, 1998. F.C. App. 1576.

As a result of this determination, the Foundation commenced this action pursuant to 26 U.S.C. § 7428 in the Court of Federal Claims ("the trial court"), seeking a declaratory judgment that, during the tax years in issue, 1998, 1999, and 2000, it retained its status as a church under the Code. F.C. App. 57. Both the Foundation and the United States ("Respondent") filed cross-motions for summary judgment

pursuant to Rule 56 of the Rules of the Court of Federal Claims ("RCFC"). F.C. App. 3610 *et seq.* and 6380 *et seq.* The trial court, *sua sponte*, decided to consider the parties' cross-motions for summary judgment as motions for judgment on the administrative record under RCFC 52.1(c). App., *infra* 4a.

On July 21, 2009, the trial court issued its opinion denying the Foundation's motion and granting Respondent's motion and holding that, for each of the three tax years at issue, the Foundation did not qualify as a church within the relevant portions of the Code. App., *infra* 3a. The trial court reached its legal conclusion despite the fact that the Foundation produced extensive evidence regarding its religious ministry and the manner in which that ministry was accepted and viewed by its followers.

Many of the facts presented by the Foundation were expressly adopted by the trial court, which found that the Foundation met nine of the fourteen criteria under the IRS test.[2] Thus, the trial court

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[2] Although the trial court used the IRS criteria as a guide to determining church status under the Code, it noted that the criteria "bear a striking similarity" to inquiries into religious beliefs and practices included in the 1906 Census of Religious Beliefs, inquiries which had raised concerns that the government was infringing on religious liberty and invading the privacy of citizens. App., *infra* 31a. The trial court stated that the resemblance of the fourteen IRS criteria to the 1906 Census "strongly suggests that defendant's criteria are time-conditioned and reflect institutional characteristics that no longer capture the variety of American religions and religious institutions in the twenty-first century." *Id.* The trial court thus concluded that the IRS "regime appears to favor some forms of religious expression over others in a manner in which, if not inconsistent with the letter of the Constitution, the court finds troubling when considered in light of the constitutional protections of the Establishment and Free Exercise Clauses." *Id.*

concluded it was uncontested that the Foundation had an independent legal existence and a recognized creed and form of religious worship. App., *infra* 45a. The trial court further concluded that the Foundation had a distinct religious history; used a variety of methods to spread its religious beliefs including radio broadcasts, written publications and phone-based religious counseling; and had thousands of followers who practiced its meditation techniques, attended seminars, read its publications and felt an affinity with the Foundation and its religious message. App., *infra* 46a.

The trial court also found that the Foundation had a distinct religious literature of its own; had a definite and distinct ecclesiastical government; and a formal code of religious doctrine and discipline. App., *infra* 47a, 49a-51a. Importantly, the trial court also concluded that, during the tax years in issue, the Foundation had an established place of worship, the Tall Timber Ranch in Selma, Oregon. App., *infra* 47a. Although the Foundation sold its Los Angeles and Grants Pass properties in 1994, the trial court found that the Foundation's ministers conducted personal counseling, instruction in meditation techniques and self-awareness and otherwise presented and discussed the teachings of the Foundation at the Tall Timber Ranch during the tax years at issue. App., *infra* 47a-49a. The trial court also found that the Foundation had, during the tax years at issue, an organization of ordained ministers who were selected after completing a prescribed course of study that ranged between a few months and several years. App., *infra* 52a-53a.

However, the trial court found that five of the fourteen criteria developed by the IRS were not met.

Some of these findings were non-controversial. For example, the Foundation conceded that it did not have formal membership and did not require its followers to reject or abandon affiliation with other churches or faiths. App., *infra* 45a. Similarly, the Foundation conceded that it did not have schools for the preparation of its ministers and that the Brighton Academy, a school it had previously operated to provide general education as well as religious instruction to children, had been separately incorporated in 1991 and was no longer directly operated by the Foundation. App., *infra* 52a, 54a.

However, the trial court's conclusions that the Foundation did not have a regular congregation and did not conduct regular religious services were based on conflicting evidence. For example, the Foundation presented evidence that, since 1979 and continuing thereafter, including during the tax years at issue, it conducted services and seminars, referred to as "meetings," at the Tall Timber Ranch. F.C. App 3659. Similar meetings were held at other locations as well. F.C. App. 1264-1265. Although these meetings occurred less frequently during the tax years at issue because of a period of Roy Masters' physical illness, the trial court nonetheless determined that twenty-one meetings had, in fact, occurred, albeit at irregular intervals, during this time period and that their content was religious, *i.e.*, that a minister of the Foundation preached to a group of between ten and thirty individuals about meditation practices, good and evil, Adam and Eve and a wide variety of other religious subjects. App., *infra* 56a, 64a, n. 23.

The Foundation also produced approximately one thousand letters, emails, and declarations from various individuals, including approximately three

hundred incarcerated persons, many of which contained statements that these individuals viewed the Foundation as their church, gained spiritual benefit from its teachings, and participated in the Foundation's services. App., *infra* 59a-61a. The trial court viewed "these letters, emails, and declarations as evidence that plaintiff has an established group of followers." App., *infra* 61a. Moreover, the trial court acknowledged that the government stipulated that the Foundation has thousands of followers "who practice the meditation techniques, attend seminars, [and] read the Foundation publications." App., *infra* 62a.

Nonetheless, the trial court concluded that "[a] group of followers, however, is not synonymous with a 'regular congregation.'" App., *infra* 61a. The trial court ruled that the letters, emails and declarations submitted by the Foundation did not "show a group of followers that regularly congregates in any form—whether virtually or in one another's physical presence." App., *infra* 62a. And although there was evidence of various in-person meetings at the Tall Timber Ranch and elsewhere during the tax years at issue, the trial court concluded that this fact did not establish that the Foundation had a regular congregation because, in its view, there was insufficient evidence concerning "the regularity, if any, with which" the Foundation's congregants assembled together to worship. App., *infra* 56a.

Having ruled that the thousands of Foundation followers did not constitute a regular congregation for purposes of the IRS criteria for church status, the trial court also found that the Foundation did not conduct regular services. In support, the trial court first found that the Foundation's "services in the form

of Sunday meetings, weddings, and seminars, are not frequent enough to be characterized as 'regular.'" App., *infra* 65a. Second, the trial court found that the Foundation's radio and Internet broadcasts did not qualify as religious services. *Id.*

Despite the fact that the Foundation's radio call-in show was transmitted on more than 130 radio stations and over the Internet as well, the trial court declined to accept the Foundation's contention that its adherents "assemble" to receive its spiritual message and that this message is "no less heard by the congregation than [it] would be if [it] were delivered in a room with a pulpit." App., *infra* 66a. Instead, the trial court found that the Foundation had not adequately demonstrated that its adherents "regard their experience while listening to plaintiff's broadcasts as a shared experience with other of plaintiff's followers, or as a communal experience in any way" and concluded that "radio and internet broadcasts lack critical associational aspects characteristic of religious services." App., *infra* 66a-67a. As a result, the trial court held that, although the Foundation met nine of the fourteen IRS criteria and the case presented "a close question," the IRS test for determining church status was not met. App., *infra* 67a.

The trial court then proceeded to analyze the Foundation's church status under the alternative "associational test" articulated in *American Guidance Foundation v. United States*, 490 F. Supp. 304, 306 (D.C. 1980). Under this test, a church, "[a]t a minimum" must include a "body of believers or communicants that assembles regularly in order to worship" and, "[u]nless the organization is reasonably available to the public in its conduct of worship, its

educational instruction, and its promulgation of doctrine, it cannot fulfill this associational role." *Id.* at 306.

Applying this associational test, the trial court found, largely because the Foundation no longer held services at its Los Angeles and Grants Pass facilities, that it "no longer provides religious services to an established congregation." App., *infra* 69a. Notwithstanding its finding that, during the tax years at issue the Foundation conducted not less than twenty-one services at the Tall Timber Ranch and elsewhere, the trial court concluded that the Foundation's "primary activities are internet and radio broadcasting," which were not associational in nature, and that these activities were "no longer supplemented by the Foundation's associational activities in existence at the time of the Tax Court's decision in *Foundation I*." *Id.* As a result, the trial court concluded that the Foundation no longer qualified as a church under either the IRS criteria or the "associational" test. App., *infra* 72a-73a.

3. The Proceedings Before the Federal Circuit Court of Appeals. The Foundation appealed to the Court of Appeals for the Federal Circuit, which affirmed the decision of the trial court. In doing so, the Court of Appeals stated that, while the trial court "referred to the 14 [IRS] criteria in the course of its factual findings, it ultimately decided the case by applying the associational test, which defines a church as an organization that includes a body of believers who assemble regularly for communal worship." App., *infra* 78a. The Court of Appeals agreed "that the associational test is an appropriate test for determining church status under section 170, although we recognize that the associational test and

the '14 criteria test' substantially overlap; as courts have pointed out, among the most important of the 14 criteria are the requirements of 'regular congregations' and 'regular religious services.'" App., *infra* 81a.

In upholding the trial court's determination that the Foundation did not hold regular services with a regular congregation during the tax years at issue, the Court of Appeals first addressed "the Foundation's in-person services." App., *infra* 83a. While acknowledging that the Foundation held twenty-one services, five at the Tall Timber Ranch and sixteen at other locations, during this time period, the Court of Appeals found that "attendance of groups of people at occasional seminars in cities scattered across the country does not constitute a regular assembly of a cohesive group of people for worship." *Id.* With regards to the five services held at the Tall Timber Ranch, the Court of Appeals stated that they did not enable "congregants to establish a community of worship." *Id.*

Although recognizing that "the associational test does not demand that religious gatherings be held with a particular frequency or on a particular schedule," the Court of Appeals concluded that the test "does require gatherings that, by virtue of their nature and frequency, provide the opportunity for members to form a religious fellowship through communal worship." App., *infra* 83a-84a. Discounting the communications from numerous individuals "stating that they had received the Foundation's teachings and considered the Foundation to be their church," the Court of Appeals found that there was insufficient evidence that these individuals had attended in-person services as opposed to "receiv[ing]

the Foundation's teachings through its electronic ministry." App., *infra* 84a.

The Court of Appeals next addressed that electronic ministry. The Court of Appeals rejected the Foundation's argument that "its members regularly assembled to worship as a 'virtual congregation' by listening to sermons broadcast over the radio and the Internet at set times, referred to as 'appointments to listen,'" and instead held that such activity could not be associational because simultaneous receipt of the Foundation's message "does not mean that those members associated with each other and worshipped communally." App., *infra* 85a. The Court of Appeals also rejected the Foundation's argument that "it satisfied the associational test because its electronic ministry included a 'call-in' show that enabled individuals to call and interact with the Foundation's clergy over the telephone," interactions which were then "broadcast to listening congregants and subsequently transcribed for distribution." App., *infra* 85a-86a. In response to this argument, the Court of Appeals broadly stated: "However, a call-in show, like other forms of broadcast ministry, does not provide individual congregants with the opportunity to interact and associate with each other in worship, and it therefore does not provide a basis for concluding that the Foundation's religious activities satisfied the associational test." App., *infra* 86a. Based largely on this conclusion, the Court of Appeals affirmed the trial court's holding that the Foundation did not constitute a church for purposes of federal tax law. *Id.*

REASONS FOR GRANTING THE PETITION

Congress has seen fit to draw important and meaningful distinctions in the Code between churches

and other religious organizations, not least of which is the exemption for churches from the requirement to file annual informational tax returns and the substantive and procedural protections afforded churches against intrusive IRS investigations. 26 U.S.C. § 6033; 26 U.S.C. § 7611. *See also* Charles M. Whelan, *"Church" in the Internal Revenue Code: The Definitional Problems*, 45 Fordham L. Rev. 885, 890-91 (1976-1977) (noting "significant distinctions" in the Code with respect to issues including "charitable contributions, pension plans, freedom to lobby for changes in the law, the necessity to apply to the Service for an exemption ruling in order to be entitled to treatment by the Service as an exempt organization, private foundation status, * * * , liability for state unemployment taxes, the obligation to file annual financial reports, and the obligation to report a liquidation, dissolution, termination, or substantial contraction.").

But despite these important and far-reaching distinctions by which churches are afforded protections not extended to other religious organizations, Congress has offered no statutory definition of the term "church" and the IRS has promulgated no regulations offering either the courts or the public any guidance as to the term's meaning. *See* App., *infra* 79a (the Court of Appeals noted that "[n]either Congress nor the IRS has provided much guidance as to the meaning of the term 'church' in I.R.C. § 170 or what is required for an institution to qualify for that designation" because, "[a]s the trial court observed, neither the statute nor any IRS regulation defines that statutory term").

Similarly, this Court's precedents offer little substantive interpretation of the term. *See St. Martin*

Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 784 n.15 (1981) (while defining the term church in a federal unemployment tax case as the "congregation or the hierarchy itself, that is, the church authorities" rather than "a physical building that is a house of worship," the Court specifically stated that it "disavow[ed] any intimations in this case defining or limiting what constitutes a church under FUTA or under any other provision of the Internal Revenue Code").

This definitional and interpretive void has led lower courts to either apply the "common understanding of the word" as the applicable legal test, *De La Salle Institute v. United States*, 195 F. Supp. 891, 903 (N.D. Cal. 1961), a wholly unsatisfactory and *ad hoc* inquiry, or to apply tests that place controlling weight upon traditional, often Christian-centric notions of what churches should be, notions that focus on religious services being conducted in discrete physical locations where, despite the tenets of the religious faith involved, congregants must physically assemble to engage in communal worship. *See* App., *infra* 81-82a (the Court of Appeals noted that, under either the "14 criteria test" or the associational test, to be considered a church, a religious organization "must create, as part of its religious activities, the opportunity for members to develop a fellowship by worshipping together").

The legal tests for "church" status being currently applied are unacceptable for two major reasons. First, as found by the trial court, the "14 criteria" test applied by the IRS "reflect[s] institutional characteristics that no longer capture the variety of American religions and religious institutions in the twenty-first century" and appear to "favor some forms of religious

expression over others in a manner in which, if not inconsistent with the letter of the Constitution, [is] troubling when considered in light of the constitutional protections of the Establishment and Free Exercise Clauses." App., *infra* 31a. The associational test's adoption of certain of the IRS criteria, with its apparent preference for "brick and mortar" churches and a group of followers engaged in communal worship, suffers from many of these same deficiencies.

The current legal tests also are unsatisfactory because they ignore technological advances that permit church followers to participate in church services in multiple ways: through interactive radio or television presentations, the Internet, or other means as yet undiscovered or even unimagined. The current legal tests, including the associational test adopted by the Court of Appeals, give "short shrift" to such contemporary means of worship by adhering to an outmoded view that a church denotes, in most cases, a building with walls.

This Court should grant the petition to decide the important questions of federal law presented herein and to bring clarity and legal certainty to the current distinction drawn by Congress between churches and other religious organizations. Supreme Court Rule 10(c).

I. THIS COURT SHOULD DEFINE THE APPROPRIATE LEGAL TEST TO BE USED TO DISTINGUISH BETWEEN CHURCHES AND OTHER RELIGIOUS ORGANIZATIONS.

As it currently stands, serious legal uncertainty exists as to which religious organizations are entitled to the protections of church status and which are not.

The term "church" is not defined in the Code or elsewhere in federal statutory law. The Treasury Regulations (26 C.F.R.) promulgated under Code section 170 are circular and unhelpful; they merely define an "organization described in section 170 (b)(1)(A)(i)," *i.e.*, a church, to be "a church or a convention or association of churches." Treas. Reg. § 1.170A-9(a).

Dictionary definitions and common usages of the word "church" are similarly unhelpful because they either focus on the physical structure in which worship takes place or upon organizations of Christians. *See, e.g., Webster's Third New International Dictionary* (defining "church" variously as "a building set apart for public especially Christian worship" or as "the organization of Christianity or of an association of Christians"). The former definition was previously rejected by this Court for purposes of the unemployment tax in *St. Martin Evangelical Lutheran Church*, 451 U.S. at 784. The latter definition would almost certainly offend the First Amendment's Establishment Clause. *See Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

Thus, the lower courts have had little or nothing to guide them in formulating an acceptable belief-neutral definition. The fourteen criteria applied by the IRS had their genesis in a speech given by then-Commissioner Jerome Kurtz at a 1978 continuing legal education event. *Remarks of IRS Comm'r*, Jerome Kurtz, PLI Seventh Biennial Conference on Tax Planning (1/9/78), *reprinted in* FED Taxes (P-H) ¶ 54,820 (1978). Although the IRS reprinted these criteria in its internal written instructions to its

employees,[3] they have never been adopted as part of the Treasury Regulations, do not have the force of law and may, at the most, be looked at by the courts for guidance. *See Fed. Express. v. Holowecki*, 552 U.S. 389, 397-99 (2008) (while statements in an agency's interpretive manual may be given a "measure of respect" under certain circumstances, they are not to be given the full deference afforded to an agency's interpretation of its own regulations).

Some courts have, in fact, applied the IRS criteria as a helpful guide to determining church status without expressing concern about their application. *See, e.g.*, *United States v. Jeffries*, 854 F.2d 254, 258 (7th Cir. 1988) (the Seventh Circuit applied the fourteen criteria as a "guide" to determining church status); *Lutheran Social Service of Minnesota v. United States*, 758 F.2d 1283, 1287 (8th Cir. 1985) (in deciding that the plaintiff was a social services agency and not a church, the Eighth Circuit applied the fourteen criteria).

But others courts, including the courts below, have refused to adopt the IRS test, often due to First Amendment concerns raised by their application. Thus, the Tax Court in *Foundation I* expressly declined to adopt the IRS test. *Foundation I*, 88 T.C. at 1358. Similarly, the trial court here did not adopt the IRS test and instead expressed concern that it "appears to favor some forms of religious expression over others," App., *infra* 31a, and the Court of Appeals stated that it "share[d] the concerns expressed by the trial court" in this regard. App., *infra* 80a. *See also* Reka Potgeiter Hoff, *The Finan-*

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[3] *See* Internal Revenue Manual 7(10)69, *Exempt Organizations Examination Guidelines Handbook* 321.3(3) (Apr. 5, 1982).

cial Accountability of Churches For Federal Income Tax Purposes: Establishment or Free Exercise, 11 Va. Tax Rev. 71, 104 (1991-92) ("The problem is that the criteria fail to take into account the fact that many of the most active churches in America are unorthodox groups which reject the Judeo-Christian world view of the mainline churches and whose activities do not come within any of these criteria."). This Court should grant this petition in part to make it clear that the IRS test is an inappropriate and hidebound vehicle to determine church status.

However, the "associational test" adopted by some courts, including the courts below, does not eliminate the infirmities present in the IRS test and should also be rejected. The associational test finds its roots in a concurring opinion in a decision of the Tax Court, *Chapman v. Comm'r*, 48 T.C. 358, 367 (1967), which stated:

> In my opinion, the word "church" implies that an otherwise qualified organization *bring people together as the principal means* of accomplishing its purpose. The objects of such gatherings need not be conversion to a particular faith or segment of a faith nor the propagation of the views of a particular denomination or sect. The permissible purpose may be accomplished individually and privately in the sense that oral manifestation is not necessary, but it may not be accomplished in physical solitude. (emphasis in original).

Several courts have expanded on the central assumption of this concurring opinion, that a church must involve a physical assembly of individuals engaged in communal activity. Thus, in *American Guidance Foundation*, the court stated that, "[a]t a minimum, a church includes a body of believers or

communicants that assembles regularly in order to worship." *American Guidance Foundation*, 490 F. Supp. at 306. Similarly, in *Church of Eternal Life & Liberty*, 86 T.C. at 927, the Tax Court, citing *Chapman*, stated: "A church is a coherent group of individuals and families that join together to accomplish the religious purposes of mutually held beliefs." *See also Church of Spiritual Tech. v. United States*, 26 Cl. Ct. 713, 731 n.36 (1992) (the same).

The "associational test" thus requires that a religious organization have a regular and cohesive congregation of individuals that regularly come together to engage in regular and communal religious worship. *See, e.g., First Church of In Theo v. Comm'r*, 56 T.C. Memo 1989-16, *21, 56 T.C.M. (CCH) 1045 (1989) (a religious organization must "satisfy the threshold criteria of communal activity" to be a church). In essence, courts adopting the associational test have isolated two of the fourteen IRS criteria, "regular congregations" and "regular religious services," as controlling. *See, e.g., Spiritual Outreach Society v. Comm'r*, 927 F.2d 335, 339 (8th Cir. 1991) (the existence of an established congregation served by an organized ministry during regular religious services is "of central importance").

This view is most evident in the decision below in which the Court of Appeals stated that "a religious organization must create, as part of its religious activities, the opportunity for members to develop a fellowship by worshipping together." App., *infra* 81a-82a. The Court of Appeals thus created a hard and fast rule that, unless a regular group of "cohesive" followers participate in regular services in which they worship communally, the organization simply cannot

be a church. App., *infra* 84a.[4] However, the Court of Appeals offers no guidance as to how "regular" or "cohesive" the group of followers must be or how often religious services must take place. For example, had the Foundation conducted twenty-five or thirty services during the tax years at issue, rather than twenty-one, would that have been sufficient to retain church status? The Court of Appeals' decision offers no answer.

Aside from being vague and incapable of precise definition, the Court of Appeals' application of the eleventh and twelfth IRS criteria, "regular congregations" and "regular religious services," as controlling factors, without which a church cannot exist, also favors some forms of religious expression over others. For example, the criterion of "regular religious services" is not satisfied by many well-established Eastern religions. *See* Reka Potgeiter Hoff, *The Financial Accountability of Churches For Federal Income Tax Purposes: Establishment or Free Exercise*, 11 Va. Tax Rev. 71, 105 (1991-92) ("the sixth criterion of exclusive religious affiliation and the eleventh criterion of regular religious services, would not

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[4] The Foundation has claimed throughout this litigation that it does, in fact, have a "regular congregation" and holds "regular services" sufficient to establish that these IRS criteria have been met. For example, the various services held at the Tall Timber Ranch and other locations, in coordination with the Foundation's regular radio and Internet services, meet these aspects of the IRS test. *See Purnell v. Comm'r*, T.C. Memo 1992-289, *8, 63 T.C.M. (CCH) 3037 (1992) (finding that a religious organization held weekly services for small groups in rented spaces and acted as "a street church" with the minister preaching to "anyone he [could] interest in his message," the Tax Court concluded that the religious organization acted to bring people together in a manner consistent with church status).

apply to most Japanese, Chinese, or Asian Indians who commonly treat Confucianism, Buddhism and Taoism as virtually one religion and for which mystical contemplation and meditation constitute a religious service").

Because the associational test suffers from many of the same infirmities as the IRS test, this Court should accept the unique opportunity offered here to articulate a uniform test of church status for tax purposes that does not provide significant protections to religious organizations based on an ethnocentric view of religious expression. A proper test focuses not on historically familiar and comfortable notions of what a traditional Christian church looks like, notions that animate the IRS test. Nor does it focus almost entirely on the existence of communal worship during regularly conducted in-person services, as does the associational test. The associational test, like the IRS test, relies for the most part on traditional notions regarding church status, for example, that a consistent group of individuals and families who show up regularly each Sunday at a building with a steeple constitute a church.

This case affords the Court an opportunity to apply a definition of "church" that focuses on the existence of an organization that promulgates a religious ministry to a group of believers who, whether they congregate in a traditional way and on a regular basis sufficient to satisfy traditional views of a "church," nevertheless seek out the teachings of the organization and express or acknowledge a personal affiliation with its religious tenets. *See American Guidance Foundation*, 490 F. Supp. at 307 (in order to be a church, an organization "must employ recognized, accessible channels of instruction and

worship"). Such a "totality of the circumstances" test has the salutary effect of weeding out "family churches" formed primarily for tax avoidance purposes while permitting organizations satisfying the test to enjoy unchallenged the protections of "church" status. *See, e.g.*, *Church of the Visible Intelligence that Governs the Universe v. United States*, 4 Cl. Ct. 55, 65 (1983) (where membership of an organization did not extend beyond founder's immediate family, the organization was "engaged in a private religious exercise, rather than a church"); *American Guidance Foundation*, 490 F. Supp. at 307 (recognition as a church of a group which includes only family members would "encourage sham representations to the IRS and result in adverse tax consequences to the public at large").

Here, there can be no question that the Foundation has conducted in-person sacerdotal activities at its facility in Oregon and elsewhere during the tax years at issue which, combined with its extensive written publications and radio and Internet ministry, reached thousands of followers who sought and participated in its ministry. Under these circumstances, the Court of Appeals' finding that the Foundation's in-person services are not sufficiently frequent or that the persons who attend those services do not do so on a consistent enough basis should not, as a matter of law, be sufficient to deny the Foundation church status.

II. THE COURT OF APPEALS' DISREGARD OF THE FOUNDATION'S RADIO AND INTERNET MINISTRY WAS ERRONEOUS.

Giving controlling weight to the presence of regular congregations attending regular in-person religious services, the Court of Appeals held that the Founda-

tion's Internet and radio ministry simply did "not provide a basis for concluding that the Foundation's religious activities satisfied the associational test." App, *infra* 86a. Thus, according to the Court of Appeals, a religious organization's efforts to disseminate its religious message through its publishing or broadcasting activities are wholly irrelevant to its status as a church.

This constricted view of religious activity ignores expanding efforts by many churches to reach their followers through various modern technological means. Similarly, it ignores efforts by many followers of various religious faiths to observe and participate in religious services through the use of technology. This Court should grant the petition in this case to make clear that the use of technology to disseminate a religious message is not inconsistent with church status. Therefore, if the use of that technology arguably outstrips in frequency or breadth traditional in-person religious services, a religious organization does not risk, as in this case, losing its recognized status as a church.

The issues presented in this case are of critical importance because many religious organizations are increasingly resorting to the use of technology to reach their followers and to spread their religious messages. While only a few years ago the use of podcasts and blogging by churches to reach their members was considered innovative, today many churches have adopted these as effective means to create online campuses. *See* Tony Morgan, *2008 America's Most Innovative Churches, Outreach Magazine*, Jan. 2008 (*Outreach Magazine*, a journal for evangelical Christian churches, stated: "In our first annual report on innovative churches, we called

podcasts and blogging innovative. In less than a year, the times have changed dramatically.").

Many churches utilize their Internet presence as a central means of expanding their following and providing their followers with an opportunity to participate in their services. Thus, the Flamingo Road Church (now known as the Potential Church) has set a goal of "fifty churches worldwide, 100,000 members and a $150-million-a-year budget." Alexander Alter, *Inspired by Starbucks*, Wall St. J., June 13, 2008, at W1. To facilitate its growth, that church uses closed circuit television and satellite feeds to spread its teachings across the United States and South America. In addition, it notifies followers on its website that it presents regular religious services at six locations, five physical locations and one Internet location. *See* http://potentialchurch.com/locations.

Furthermore, even highly traditional churches such as the Catholic Church recognize the value and powerful effect of advancing communications technology, including the Internet. *See, e.g.*, Pontifical Council for Social Communications, *The Church and Internet*, Feb. 22, 2002, II(5) (the Internet serves as a vehicle for evangelization, "offers people direct and immediate access to important religious and spiritual resources" and "has a remarkable capacity to overcome distance and isolation, bringing people into contact with like-minded persons of good will who join in virtual communities of faith to encourage and support one another.").[5]

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[5] While the Catholic Church teaches that "the virtual reality of cyberspace cannot substitute for real interpersonal community, the incarnational reality of the sacraments and the liturgy, or the immediate and direct proclamation of the gospel, it can

While the Internet has become a useful means by which churches can spread their message and bring religious services into the homes of countless individuals, it has also become an important and convenient means by which the followers of these churches can attend such services and receive the church's message when they are unable or unwilling to travel to the church's physical facility. *See* Elizabeth Berstein, *More Prayer, Less Hassle*, Wall St. J., June 27, 2003, at W1. Again, the Catholic Church has recognized the Internet's impact in this regard: "[The Internet] also provides the Church with a means for communicating with particular groups—young people and young adults, the elderly and home-bound, persons living in remote areas, the members of other religious bodies—who otherwise may be difficult to reach." Pontifical Council for Social Communications, *The Church and Internet*, Feb. 22, 2002, II(5).

Thus, far from being wholly irrelevant to a church's associational role, as the Court of Appeals decided, the use of electronic means to deliver its ministry can further in significant ways a religious organization's fundamental purposes and, in addition, provide a significant means of communication and interaction amongst the organization's followers and between those followers and the organization itself.

This is precisely the case here. The Foundation, through its radio and Internet services, is able to reach thousands of individuals who may be unable to travel to its facility in Selma, Oregon, including numerous incarcerated individuals who regularly

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complement them, attract people to a fuller experience of the life of faith, and enrich the religious lives of users." Pontifical Council for Social Communications, *The Church and Internet*, Feb. 22, 2002, II(5).

listen to its radio services. Additionally, the services themselves are interactive in the sense that the Foundation's followers may call in and speak directly to the Foundation's clergy. These communications are themselves disseminated as a part of the radio programming so that other followers of the Foundation may share in the communications. This feature of the Foundation's electronic ministry brings people together in a manner which is clearly consistent with church status.

Despite these uncontradicted facts, the Court of Appeals held that the Foundation's radio and Internet ministries could not be deemed in any manner "associational." App., *infra* 86a. According to the Court of Appeals, despite the Foundation's electronic ministry, the fact that its in-person religious services became less frequent during the tax years at issue because of its founder's physical illness caused the loss of the Foundation's status as a church. App., *infra* 84a.

This proposition is dubious for several reasons. First, it punishes a church for its successful use of television, radio and/or Internet ministries. Under the Court of Appeals' decision, if a church reaches thousands, or hundreds of thousands, of followers through these means, it risks loss of church status if, at the same time, it reaches only a few hundred followers during in-person religious services. According to the Court of Appeals, under those circumstances, the church's in-person services become "merely incidental to the Foundation's "primary purposes" of reaching followers through its "electronic ministry." App., *infra* 84a-85a.

Second, the Court of Appeals' holding appears to ignore any interaction between followers other than

interaction that occurs while they are physically present in the same room. In light of continuing advancements in communications technology in the twenty-first century, there is no justification for the Court of Appeals' insistence that religious communication and association be frozen in time to include only direct interpersonal interaction.

Indeed, through expanded use of convenient and inexpensive modes of videoconferencing, such as made available by services such as Skype, interactive attendance at religious services without physical presence is likely to become more frequent in the future. The courts below ignore the interactive element of the Foundation's radio and Internet services, choosing instead to view them as a "broadcast" ministry by which there is merely a broad, non-directed "blast" of information directed at anyone who might hear it, regardless of their interest or intent to participate in a religious service. But the record demonstrates that, in fact, the Foundation's followers regularly and frequently gather with intent and purpose around radios and over the Internet at appointed times to participate in these services and interact with the Foundation's clergy. F.C. App. 3660-3661. The fact that they may not assemble weekly at a building with a steeple does not change the fact that they are participating in a "church" service.

The Court of Appeals' insistence that a religious organization can be a church only if its followers regularly congregate at regular times to communally worship in person also favors established churches and is Christian-centric. Many religions such as Buddhism and Taoism do not place the same emphasis on communal worship that Christianity does. To

say that a religious organization cannot be a church unless it promotes religious values furthered by communal worship poses serious First Amendment concerns.

Under an appropriate test for church status the Foundation achieved, and should have retained, church status because of the nature of its religious ministry and the fact that it has widespread and numerous congregants who seek out its religious message, hold it as their own, and acknowledge the Foundation to be their church. The Foundation's use of radio and the Internet is simply a means, in conjunction with its in-person services, to more widely disseminate its Judeo-Christian beliefs. There is no rule or logic which dictates that the Foundation's in-person services are separate and apart from its radio and Internet presentations. Rather, they facilitate each other as parts of the same ministry. Each is entirely consistent with the religious ministry for which the Foundation was organized and which it continues to pursue, a ministry which has successfully reached thousands of followers who find meaning and spiritual guidance in the Foundation's teachings.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari in this case in order (1) to definitively establish an appropriate legal test for church status under federal tax law that does not suffer from the infirmities inherent in the conflicting tests that have previously been applied by the courts; and (2) to make clear that an electronic ministry, whether through television, radio, the Internet, or other modern technological means, is relevant under such an appropriate test for "church" status.

Respectfully submitted,

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November 12, 2010

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

[Filed 07/22/09]

No. 04-1441 T

FOUNDATION OF HUMAN UNDERSTANDING,

v.

THE UNITED STATES

JUDGMENT

Pursuant to the court's Published Opinion and Order, filed July 21, 2009, denying Plaintiff's Motion for Summary Judgment and granting Defendant's Cross-Motion,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is in favor of defendant. No costs.

John S. Buckley
Acting Clerk of Court

By: s/ Lisa L. Reyes
Deputy Clerk

July 22, 2009

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $455.00.

APPENDIX B

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 04-1441 T
(E-Filed: July 21, 2009)

FOUNDATION OF HUMAN UNDERSTANDING,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

Judgment on the Administrative Record; RCFC 52.1; Definition of Church; Revocation of Church Status; I.R.C. § 7428(a)(1)(B); Declaratory Judgment; I.R.C. § 509(a)(1); I.R.C. § 170(b)(1)(A)(i)

MARC K. SELLERS, Portland, OR, for plaintiff.

MICHAEL J. RONEY, with whom were JOHN A. DICICCO, Acting Assistant Attorney General, and STEVEN I. FRAHM, Chief, Court of Federal Claims Section, Tax Division, United States Department of Justice, Washington, DC, for defendant. W.C. RAPP, Senior Trial Attorney, Court of Federal Claims Section, Tax Division, United States Department of Justice, Washington, DC, of counsel.

OPINION and ORDER

HEWITT, *Chief Judge*

Before the court are Plaintiff's Motion for Summary Judgment (plaintiff's Motion or Pl.'s Mot.), Plaintiff's Memorandum in Support of Its Motion for Summary Judgment (plaintiff's Memorandum or Pl.'s Mem.), the Cross-Motion of the United States for Summary Judgment and Brief in Support Thereof and in Opposition to Plaintiff's Motion for Summary Judgment (defendant's Motion or Def.'s Mot.), Plaintiff's Reply in Opposition to Defendant's Cross Motion for Summary Judgment, and in Support of Plaintiff's Motion for Summary Judgment (plaintiff's Reply or Pl.'s Reply), defendant's Reply for the United States in Support of Its Cross Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment (defendant's Reply or Def.'s Reply), the Supplementary Brief of the United States on the Questions of Jurisdiction, Evidence, and Exhaustion of Administrative Remedies, Pursuant to the Order of April 9, 2009 (defendant's Supplemental Brief or Def.'s Supp. Br.), and Plaintiff's Supplemental Brief on Issues Raised by the Court (plaintiff's Supplemental Brief or Pl.'s Supp. Br.). Also before the court is the administrative record (Admin. Rec.), which was filed on October 23, 2006, and supplemented on September 25, 2008.

For the following reasons, plaintiff's Motion is DENIED, and defendant's Motion is GRANTED.[1]

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[1] Upon reviewing the parties' briefing and possibly applicable rules, the court has concluded that it would be most appropriate to issue its decision in this action pursuant to Rule 52.1 of the Rules of the United States Court of Federal Claims (RCFC), which provides for judgments based on the administrative record "[w]hen proceedings before an agency are relevant to a

I. Background

A. Identity of Plaintiff

Plaintiff, Foundation of Human Understanding (Foundation), is a California nonprofit corporation incorporated on June 17, 1963. Admin. Rec. 461; Plaintiff's Proposed Findings of Uncontroverted Fact (RCFC 56(h)) (plaintiff's Facts or Pl.'s Facts) ¶ 1; *see* Defendant's Response to Plaintiff's Proposed Findings

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decision in a case" before the court. RCFC 52.1(a). Accordingly, the court treats the parties' Motions as "Motions for Judgment on the Administrative Record" pursuant to RCFC 52.1(c). RCFC 52.1(c).

In Plaintiff's Motion for Reconsideration of [the] Court's Order to Recharacterize Cross Motions for Summary Judgment RCFC 52 (plaintiff's Motion for Reconsideration or Pl.'s Recons. Mot.), plaintiff raises concerns regarding the standard of review applied in cases previously decided in the United States Court of Federal Claims pursuant to RCFC 52.1. Pl.'s Recons. Mot. ¶10. However, plaintiff correctly notes that those cases were governed by standards established under "the [Administrative Procedure Act (APA)] or similar statutes," and are therefore distinguishable from the present case, which is governed by the court's declaratory judgment jurisdiction pursuant to I.R.C. § 7428 (2006). Pl.'s Recons. Mot. ¶12. The court therefore does not perceive that a judgment under RCFC 52.1 affects the outcome [sic] the case. Under both RCFC 52.1 and RCFC 56, the standards of review and burdens of proof and persuasion are set by the terms of the applicable substantive law, which in this action comprises both statutory and case law. *See* RCFC 52.1 Rules Comm. Note (2006) ("The standards and criteria governing the court's review of agency decisions vary depending upon the specific law to be applied in particular cases."); *see also Anderson v. Liberty Lobby, Inc.* (*Anderson*), 477 U.S. 242, 248 (1986) ("As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude summary judgment.").

Accordingly, plaintiff's Motion for Reconsideration is DENIED.

of Uncontroverted Fact (defendant's Response to plaintiff's Facts or Def.'s Resp. to Pl.'s Facts) 7 (stating no substantive objection to Pl.'s Facts ¶ 1). "Plaintiff's founder, and its [p]resident from its date of incorporation to the present, is Roy Masters." Joint Stipulation of Facts, Dkt. No. 47, filed May 23, 2008 (Joint Stip.) ¶ 2 (citing Admin. Rec. 26). "Since 1961[,] Roy Masters has been teaching his Judeo-Christian beliefs in the United States." Joint. Stip. ¶ 3 (citing Admin. Rec. 26, 7071).

Plaintiff's Articles of Incorporation state that plaintiff's "specific and primary purposes are the promulgation of the religious, charitable, scientific, literary and educational aspects of mind over matter and spiritual health known as psychocatalysis." Admin. Rec. 462. "Roy Masters has developed a particular form of meditation that is used by his followers." Pl.'s Mem. 6; Admin. Rec. 6390-6460 (Technical Advice Pre-Submission Conference Material) 51 ("[Foundation's] form of worship is self meditation").

B. Procedural History

"The Internal Revenue Service [(IRS)] formally recognized plaintiff's tax-exempt status as an organization described in the Internal Revenue Code [(Code or I.R.C.)] § 501(c)(3) on December 20, 1965." Defendant's Proposed Findings of Facts (defendant's Facts or Def.'s Facts) ¶ 4; Plaintiff's Response to Defendant's Proposed Findings of Facts (plaintiff's Response to defendant's Facts or Pl.'s Resp. to Def.'s Facts) 5; Admin. Rec. 456. "On August 17, 1970, plaintiff filed with the IRS a Form 4653, 'Notification Concerning Foundation Status,' indicating that it was not a private foundation because it was a church under I.R.C. § 170(b)(1)(A)(i) and an organization described in I.R.C. § 509(a)([1])." Def.'s Facts ¶ 4; Pl.'s Resp. to

Def.'s Facts 5. On October 20, 1970, the IRS issued a determination that plaintiff was not a private foundation under I.R.C. § 509(a) because it was a publicly supported organization under I.R.C. § 170(b)(1)(a)([vi]). Joint Stip. ¶ 7 (citing Admin. Rec. 28); *see also* Def.'s Facts ¶ 4; Pl.'s Resp. to Def.'s Facts 5. "In or before 1979, [plaintiff] again requested a ruling from the IRS that it was a church." Def.'s Facts ¶ 5; Pl.'s Resp. to Def's Facts 5. In response to this request, the IRS issued an adverse determination letter on March 13, 1980 denying plaintiff's application to have its exemption classification modified to that of a church under I.R.C. §§ 509(a)(1) and 170(b)(1)(A)(i). Joint Stip. ¶ 10 (citing Admin. Rec. 29-30); *see also* Def.'s Facts ¶ 5; Pl.'s Resp. to Def.'s Facts 5. After plaintiff filed a protest, defendant issued a final adverse determination letter on February 23, 1982 stating that while plaintiff was a religious and educational organization, it did not qualify as a church. Joint Stip. ¶ 12 (citing Admin. Rec. 30); Def.'s Facts ¶ 5; Pl.'s Resp. to Def.'s Facts 5. Subsequently, plaintiff brought suit in the United States Tax Court (Tax Court) seeking a declaratory judgment that it qualified as a church under I.R.C. § 170(b)(1)(A)(i). Def.'s Facts ¶ 5; Pl.'s Resp. to Def.'s Facts 5-6; Joint Stip. ¶ 13 (citing Admin. Rec. 38). In 1987, addressing plaintiff's operations for periods before 1983, the Tax Court held that plaintiff qualified as a church under I.R.C. § 170(b)(1)(A)(i). Joint Stip. ¶ 18 (citing Admin. Rec. 53); Def.'s Facts ¶ 6; Pl.'s Resp. to Def.'s Facts 6; *Found. of Human Understanding v. Comm'r* (*Foundation I*), 88 T.C. 1341, 1360 (1987). Following the issuance of the Tax Court's opinion, the IRS "issued a revised determination letter on January 29, 1988, maintaining [p]laintiff's section 501(c)(3) status and confirming [plaintiff's] status as a church under

[s]ections 509(a)(1) and 170(b)(1)(A)[(i)], effective August 1, 1979." Joint Stip. ¶ 19; Admin. Rec. 1861.

In a letter dated October 16, 2001, the IRS notified plaintiff that it was commencing a church tax inquiry to resolve questions concerning plaintiff's continued qualification as a church under § 170(b)(1)(A)(i). Def.'s Facts ¶ 17; Pl.'s Resp. to Def.'s Facts 14; Admin. Rec. 1. Plaintiff responded on November 21, 2001. Def.'s Facts ¶ 17; Pl.'s Resp. to Def.'s Facts 14; Admin. Rec. 228. On December 21, 2001, the IRS sent plaintiff a Notice of Church Tax Examination. Def.'s Facts ¶17; Pl.'s Resp. to Def.'s Facts 14; Admin. Rec. 314. The church tax examination concluded with defendant's issuance of a Technical Advice Memorandum dated June 8, 2004. Def.'s Facts ¶ 4[2]; Pl.'s Resp. to Def.'s Facts 34; Admin. Rec. 8798-824 (IRS National Office Technical Advice Memorandum) (Technical Advice Memorandum). The Technical Advice Memorandum included defendant's conclusion that plaintiff's status as a tax-exempt organization under § 501(c)(3) should not be revoked, but that plaintiff no longer qualified as a church under § 170(b)(1)(A)(i). Def.'s Facts ¶ 4[2]; Pl.'s Resp. to Def.'s Facts 34; Technical Advice Memorandum 27. Defendant's revocation of plaintiff's church status was retroactive in its effect to January 1, 1998. Technical Advice Memorandum 27.

Plaintiff instituted the current action on September 13, 2004, to dispute defendant's revocation of its church status. Plaintiff's Complaint (Compl.) *passim*. Plaintiff contends that it is entitled to a declaratory judgment pursuant to § 7428 that it qualifies as a church under § 170(b)(1)(A)(i) as a matter of law. Pl.'s Mem. 2. Defendant maintains that, as a matter of law, plaintiff cannot prove that it meets the critical factors necessary to qualify as a church under

§ 170(b)(1)(A)(i), and therefore cannot sustain its burden of proving that defendant erroneously revoked its status as a non private foundation under I.R.C. § 509(a)(1). Def.'s Mot. 1, 44. Because the court determined that portions of the parties' arguments warranted further discussion, the court heard oral argument on the parties' Motions on May 27, 2009. *See* Transcript of May 27, 2009 Oral Argument (Tr.).

The sole issue before the court is whether plaintiff qualifies as a church described in § 170(b)(1)(A)(i).[2] Pl.'s Mem. 1; Def.'s Mot. 4.

II. Jurisdiction

A. The Statutory Scheme: I.R.C. § 7428(a), I.R.C. § 501(c)(3), I.R.C. § 509(a), and I.R.C. § 170(b)(1)(A)(i)-(vi)

Section 7428(a) of the Code vests the United States Court of Federal Claims with jurisdiction to grant

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[2] Here, as in *American Guidance Foundation, Inc. v. United States* (*American Guidance*), plaintiffs tax-exempt status under the Internal Revenue Code (Code or I.R.C.) § 501(c)(3) is not at issue. Plaintiffs Memorandum in Support of Its Motion for Summary Judgment (plaintiffs Memorandum or Pl.'s Mem.) 13 ("[Defendant] concluded that [plaintiff] is a publicly-supported charity, exempt from taxation as an organization described in 26 U.S.C. § 501(c)(3)."); Cross-Motion of the United States for Summary Judgment and Brief in Support Thereof and in Opposition to Plaintiffs Motion for Summary Judgment (defendant's Motion or Def's Mot.) 5 ("The Commissioner of Internal Revenue has ruled that [p]laintiff is a religious organization described in I.R.C. § 501(c)(3)"); *Am. Guidance*, 490 F. Supp. 304, 306 (D.D.C. 1980) (stating that the taxpayer's 501(c)(3) tax-exempt status and 509(a)(1) status were not at issue); *cf. Church By Mail, Inc. v. Comm'r*, 765 F.2d 1387, 1390, 1390 n.1 (9th Cir. 1985) (upholding United States Tax Court (Tax Court) determination that plaintiff did not qualify as a tax-exempt organization under § 501(c)(3) and therefore not reaching the question whether plaintiff was a church for purposes of § 170(b)(1)(A)(i)).

relief in cases of actual controversy involving the revocation of a taxpayer's tax-exempt classification. I.R.C. § 7428 (2006). "[T]he statute's primary purpose is to provide nonprofit organizations claiming tax-exempt or non-private foundation status with an avenue for prompt judicial relief from erroneous or arbitrary determinations by the Internal Revenue Service." *Friends of the Soc'y of Servants of God v. Comm'r* (*Friends*), 75 T.C. 209, 215 (1980).

Section 7428(a) provides that in the case of an actual controversy involving a determination by the Secretary of the Treasury "with respect to the initial classification or continuing classification of an organization as a private foundation (as defined in section 509(a))," I.R.C. § 7428(a)(1)(B), the United States Court of Federal Claims "may make a declaration with respect to such initial qualification or continuing qualification," I.R.C. § 7428(a).[3] Section 7428(a) further states that a "determination" by the Secretary of the Treasury includes "any revocation of or other change in a qualification or classification." *Id.*

Section 501(c)(3) of the Code allows an exemption from federal income taxes for certain charitable organizations. IRC. § 501(c)(3) (2006). Section 509(a) of the Code provides that organizations exempt under I.R.C. § 501(c)(3) are private foundations unless the organization fits within certain classes of public charities described in section 509(a)(1)-(4) and thereby qualifies for non private foundation status. I.R.C. § 509(a) (2006); *Church of the Visible Intelligence that*

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[3] Section 7428(a) of the I.R.C. establishes this court's declaratory judgment jurisdiction concurrent with the Tax Court and the District Court of the United States for the District of Columbia. I.R.C. § 7428(a) (2006).

Governs the Universe v. United States (Church of the Visible Intelligence), 4 Cl. Ct. 55, 64 (1983) ("Under the statutory scheme, an organization which satisfies the section 501(c)(3) criteria is considered a private foundation unless it establishes that it comes within four specified exceptions."). Specifically at issue in this case is the provision within § 509(a)(1)[4] affording exemption from private foundation status to organizations described in I.R.C. § 170(b)(1)(A)(i)-(vi).[5]

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[4] In pertinent part, I.R.C. § 509 provides:

> (a) General rule.—For purposes of this title, the term "private foundation" means a domestic or foreign organization described in section 501(c)(3) other than —
>
> (1) an organization described in section 170(b)(1)(A) (other than in clauses (vii) and (viii))[.]

I.R.C. 509(a)(1) (2006).

[5] In pertinent part, I.R.C. § 170(b)(1)(A) provides:

> (b) Percentage limitations.—
>
> (1) Individuals.— In the case of an individual, the deduction provided in subsection (a) shall be limited as provided in the succeeding subparagraphs.
>
> (A) General rule.— Any charitable contribution to—
>
> (i) a church or a convention or association of churches,
>
> (ii) an educational organization which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on,
>
> (iii) an organization the principal purpose or functions of which are the providing of medical or hospital care or medical education or medical research, if the organization is a hospital, or if the organization is a medical research organization directly engaged in the continuous

active conduct of medical research in conjunction with a hospital, and during the calendar year in which the contribution is made such organization is committed to spend such contributions for such research before January 1 of the fifth calendar year which begins after the date such contribution is made,

(iv) an organization which normally receives a substantial part of its support (exclusive of income received in the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501(a)) from the United States or any State or political subdivision thereof or from direct or indirect contributions from the general public, and which is organized and operated exclusively to receive, hold, invest, and administer property and to make expenditures to or for the benefit of a college or university which is an organization referred to in clause (ii) of this subparagraph and which is an agency or instrumentality of a State or political subdivision thereof, or which is owned or operated by a State or political subdivision thereof or by an agency or instrumentality of one or more States or political subdivisions,

(v) a governmental unit referred to in subsection (c)(1),

(vi) an organization referred to in subsection (c)(2) which normally receives a substantial part of its support (exclusive of income received in the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501(a)) from a governmental unit referred to in subsection (c)(1) or from direct or indirect contributions from the general public. . . .

I.R.C. § 170(b)(1)(A) (2006).

B. Application of the Statutory Scheme

In order properly to invoke this court's declaratory judgment jurisdiction under I.R.C. § 7428(a), there must exist an "actual controversy." I.R.C. § 7428(a). An actual controversy exists when the taxpayer has received an adverse ruling from the IRS. *CREATE v. Comm'r* (*CREATE*), 634 F.2d 803, 812-13 (5th Cir. 1981); *Baptist Hosps., Inc. v. United States* (*Baptist Hospitals*), 851 F.2d 1397, 1400 (Fed. Cir. 1988) (adopting the reasoning of the United States Court of Appeals for the Fifth Circuit in *CREATE*, and stating that "the denial or revocation of tax exempt status, or other negative determination under § 7428(a)(1), creates an actual controversy"); *McLennan v. United States* (*McLennan*), 23 Cl. Ct. 99, 103 (1991) ("For an 'actual controversy' to exist, there must be an IRS decision which directly affects an organization's 'classification or qualification' for tax exempt treatment."). While the definition of an adverse ruling has been the subject of debate in prior cases,[6] it is now accepted that "the receipt of a favorable ruling on a non-private status that is a different and less advantageous status" than the one sought by the taxpayer qualifies as an adverse determination sufficient to meet the "actual controversy" requirement of I.R.C. § 7428(a).

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[6] In *Foundation of Human Understanding v. Comm'r* (*Foundation I*), for example, the majority opinion found that the actual controversy requirement was met. *Foundation I*, 88 T.C. 1341, 1355 (1987). The dissent, however, stated that plaintiff's classification as a publicly supported charity under § 170(b)(1)(A)(vi), instead of as a church under § 170(b)(1)(A)(i), was not sufficient to establish the actual controversy requirement of § 7428 because plaintiff retained its non private foundation status under § 509(a)(1) despite the revocation by the Internal Revenue Service (IRS) of plaintiff's church status. *Foundation I*, 88 T.C. at 1384 (Williams, J., dissenting).

CREATE, 634 F.2d at 813 (approving of and adopting the reasoning of the Tax Court in *Friends*); *Friends*, 75 T.C. at 217 (holding that the court had jurisdiction over the matter because the IRS's ruling was adverse in many respects, including the fact that defendant's ruling "impose[d] terms on petitioner's foundation status which would not have been imposed upon a church"); *see Baptist Hospitals*, 851 F.2d at 1400 (agreeing with the reasoning of the United States Court of Appeals for the Fifth Circuit in *CREATE*); Peter H. Winslow, T.M.P. 885-2nd: Exempt Organizations—Declaratory Judgments (Exempt Organizations) at IV(E)(5)(a) (2008) ("Where an organization receives a favorable determination letter on foundation status under a paragraph or subdivision of § 509(a) or § 170(b)(1)(a) other than to which it argues it is entitled[,] . . . [t]he IRS treats such a ruling as an adverse determination and informs the organization of its rights under § 7428.").[7] Upon defendant's

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[7] In its Supplementary Brief of the United States on the Questions of Jurisdiction, Evidence, and Exhaustion of Administrative Remedies, Pursuant to the Order of April 9, 2009 (defendant's Supplemental Brief or Def.'s Supp. Br.), defendant opposes this court's jurisdiction over plaintiff's action, contending that the legislative history of § 7428 reveals that Congressional intent was to provide a declaratory judgment remedy only for "controversies that place in question the deductibility of charitable contributions." Def.'s Supp. Br. 13. However, the United States Court of Appeals for the Federal Circuit (Federal Circuit) has stated that this court's § 7428 declaratory judgment power is not to be narrowly construed so as to only apply in situations where an organization is in immediate danger of losing contributions. *See Baptist Hosps., Inc. v. United States* (*Baptist Hospitals*), 851 F.2d 1397, 1399 (Fed. Cir. 1988) ("Section 7428 was intended to apply where an organization was in immediate danger of losing contributions, but we do not agree that it was 'meant to be narrowly applied to that specific problem.'") (quoting

Baptist Hosps., Inc. v. United States, 12 Cl. Ct. 189, 191 (1987), *rev'd*, 851 F.2d 1397 (Fed. Cir. 1988)).

Defendant also argues that the plain language of § 7428 does not provide jurisdiction over plaintiff's action. Def.'s Supp. Br. 6-8. The court disagrees. Section 7428(a) states that "[f]or purposes of this section, a determination with respect to a continuing qualification or continuing classification includes any revocation of or other change in a qualification or classification." I.R.C. § 7428(a) (emphasis added). Plaintiff's action is a revocation case, brought subsequent to defendant's revocation of plaintiff's church status under § 170(b)(1)(A)(i). *See supra* Part I.B. The court finds that defendant's revocation resulted in a "change" in plaintiff's "classification" under § 509(a). *See* I.R.C. § 509(a).

Defendant urges that the plurality opinion finding jurisdiction in *Foundation I* not be followed, Def.'s Supp. Br. 15-33, and also contends that the United States Court of Appeals for the Fifth Circuit (Fifth Circuit) opinion in *CREATE v. Commissioner* (*CREATE*), 634 F.2d 803, 813 (5th Cir. 1981), finding that "the receipt of a favorable ruling on a non-private status that is a different and less advantageous status" than the one sought by the taxpayer qualifies as an adverse determination sufficient to meet the "actual controversy" requirement of I.R.C. § 7428(a), should not be relied upon because the *CREATE* court misconstrues *Friends of the Society of the Servants of God v. United States* (*Friends*), 75 T.C. 209 (1980), and because the *CREATE* court's finding is dicta, Def.'s Supp. Br. 16-20. In light of the Federal Circuit's opinion in *Baptist Hospitals* agreeing with the reasoning of the Fifth Circuit in *CREATE* and the Tax Court in *Friends*, the court is unpersuaded by defendant's arguments. *See Baptist Hospitals*, 851 F.2d at 1400 (agreeing with the Fifth's Circuit's statement that "the denial or revocation of tax exempt status, or other negative determination under section 7428(a)(1), creates an actual controversy.") (emphasis added).

Neither party addressed the possible relevance of *Baptist Hospitals* to the question of jurisdiction in the course of their briefing or oral argument. *See* Pl.'s Mem. *passim*; Def.'s Mot. *passim*. At the conclusion of oral argument, the court ordered the parties to file supplemental briefing addressing the applicability of *Baptist Hospitals* to plaintiff's action. Order of May 27, 2009. In its Supplemental Brief of the United States on Juris-

diction and *Baptist Hospitals*, Pursuant [sic] to the Order of May 27, 2009 (defendant's Second Supplemental Brief or Def.'s 2d Supp. Br.), defendant argues that *Baptist Hospitals* is inapplicable to plaintiff's action because Baptist Hospitals dealt with standing for purposes of § 7428(b)(1), whereas the present case implicates jurisdiction for purposes of § 7428(a)(1). Def.'s 2d Supp. Br. 2. Although defendant correctly states that *Baptist Hospitals* dealt with § 7428(b)(1), § 7428(b)(1) imposes limitations on the jurisdictional grant of § 7428(a), and the court is therefore unpersuaded by defendant's argument that *Baptist Hospitals* "has no impact" on this court's § 7428(a) jurisdiction, *see* Def.'s 2d Supp. Br. 1.

While *Baptist Hospitals* dealt primarily with the limitation contained within § 7428(b)(1) regarding standing to bring declaratory judgment actions under § 7428(a), it also dealt with the government's contention in that case that there was no "actual controversy" as required by the language of § 7428(a). *Baptist Hospitals*, 851 F.2d at 1400. The Federal Circuit endorsed the approach taken in *Friends* and *CREATE* for purposes of analyzing the actual controversy requirement of section 7428(a). *See id.* (agreeing with the Fifth's Circuit's statement that "the denial or revocation of tax exempt status, or other negative determination under section 7428(a)(1), creates an actual controversy.") (emphasis added). The court thinks it unlikely that the Federal Circuit would rely upon *Friends* or *CREATE* if it had any question as to the correctness of those decisions. The court disagrees with defendant's contention that *Baptist Hospitals* "offers nothing" on the question of jurisdiction pursuant to section 7428(a). *See* Def.'s 2d Supp. Br. 2.

Defendant also argues that the Federal Circuit's discussion of the actual controversy requirement of 7428(a) is inapplicable in this case because it applies only to the first of two prongs of a jurisdictional analysis. Def.'s 2d Supp. Br. 5. However, defendant's argument suffers from its mischaracterization of the Federal Circuit's jurisdictional analysis as a two-step process, beginning with an initial test regarding the presence of an actual controversy, followed by a second step determining "whether that controversy falls under one of the jurisdictional grants of section 7428(a)(1)." *Id.* It appears to the court that both *Baptist Hospitals*, and the *Friends* decision upon which the Federal Circuit relies

revocation of plaintiff's church status, the IRS informed plaintiff of its right to bring a declaratory judgment action under I.R.C. § 7428. Def.'s Supp. Br. Exhibit (Ex.) A (IRS Letter to Plaintiff dated September 12, 2004) 2 ("If you decide to contest this determination in court, you must initiate a suit of declaratory judgment in the United States Tax Court, the United States Claims Court or the District Court of the United States for the District of Columbia . . . . ").

Plaintiff seeks a declaration by this court that it qualifies as a church following defendant's determination that plaintiff no longer qualified as a "church" under I.R.C. § 170(b)(1)(A)(i), and defendant's subsequent revocation of plaintiff's church classification. Compl. 1. Defendant's revocation is a determination made by the Secretary "with respect to the . . . continuing classification of an organization as a private foundation (as defined in section 509(a))." *See* I.R.C. § 7428(a)(1)(B). Although plaintiff remains classified as a non private foundation under § 509(a)(1) as a publicly supported charity under § 170(b)(1)(A)(vi), that classification is a different and less advantageous status than the § 509(a)(1) status which plaintiff previously held and presently seeks. *See Exempt Organizations* at IV(E)(5)(a) (discussing the fact that status as a church is more advantageous than as a

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in *Baptist Hospitals*, engage in a single analysis of whether defendant's actions are sufficiently adverse to meet the "actual controversy" requirement contained within the language of section 7428(a) as a prerequisite to establishing declaratory judgment jurisdiction. *See Baptist Hospitals*, 851 F.2d at 1400; *Friends*, 75 T.C. at 215-17. To the extent that defendant contends that both *Baptist Hospitals* and *Friends* use the term "actual controversy" as synonymous with a "dispute" between the parties, the court disagrees with defendant's reading of both cases.

publicly supported charity because, for example, "a church receives preferential treatment under the [Internal Revenue] Code (principally [because of] the exemption from filing annual information returns . . . and the restriction on audits of churches"); *Spiritual Outreach Soc'y v. Comm'r* (*Spiritual Outreach II*), 927 F.2d 335, 337 n.2 (8th Cir. 1991) ("[T]here are additional tax benefits which inure to an organization if it is determined to be a church. These benefits include exemption from certain excise taxes and, perhaps most importantly, exemption from annual information filings."); *Church of Spiritual Tech. v. United States* (*Church of Spiritual Technology*), 26 Cl. Ct. 713, 731 n.37 (1992) (describing the advantages of being defined as a church for the purpose of the tax laws and stating that "churches may be investigated by the IRS only in accordance with strict and specific procedures"), *aff'd* 991 F.2d 812 (Fed. Cir. 1993) (Table). Therefore, an actual controversy exists in this case following the IRS's final adverse determination revoking plaintiff's status as a non private foundation under § 509(a)(1) based upon its church classification under § 170(b)(1)(A)(i). *Cf. McLennan*, 23 Cl. Ct. at 103 (finding no actual controversy where defendant had not revoked plaintiff's tax-exempt status).

Section 7428(b) also requires that the taxpayer exhaust all administrative remedies available to it within the IRS before this court's authority can properly be exercised. I.R.C. § 7428(b)(2); *St. Matthew Publ'g, Inc. v. United States* (*St. Matthew Publishing*), 41 Fed. Cl. 142, 144 (1998) ("[T]he court's authority under section 7428 may not be exercised unless a taxpayer has exhausted all available administrative remedies."). Plaintiff's exhaustion of administrative remedies within the IRS is uncontested by the parties.

See Pl.'s Mem [sic] *passim*; Def.'s Mot. *passim*; Pl.'s Supp. Br. 4-5; Def.'s Supp. Br. 35.

Because plaintiff meets both jurisdictional prerequisites, this case is properly before this court pursuant to I.R.C. § 7428.

III. Standards of Review and Scope of Review

A. Judgment on the Administrative Record

Rule 52.1 of the Rules of the Court of Federal Claims (RCFC) provides for judgment on the administrative record "[w]hen proceedings before an agency are relevant to a decision in a case" before the court. RCFC 52.1(a). Cases filed in this court, such as the present action filed by plaintiff, "frequently turn in part on action taken by an administrative agency." RCFC 52.1 Rules Comm. Note (2006). "In such cases, the administrative record may provide a factual and procedural predicate for a portion of the court's decision [.] . . ." *Id.* RCFC 52.1 applies "whether the court's decision is derived in whole or in part from the agency action reflected in the administrative record." *Id.* RCFC 52.1 does not address the standards and criteria to be applied in cases decided pursuant to RCFC 52.1 because "[t]he standards and criteria governing the court's review of agency decisions vary depending upon the specific law to be applied in [the] particular case[]." *Id.* Accordingly, the standards of review and burdens of proof and persuasion are set by the terms of the applicable substantive law, which in this action comprises both the statutory and case law discussed further below.

To render a decision in this case, the court must determine whether plaintiff is entitled to a declaratory

judgment that it qualifies as a church pursuant to § 170(b)(1)(A)(i) as a matter of law.

B. Declaratory Judgment Actions Pursuant to I.R.C. § 7428(a)(1)(B)

1. *De Novo* Review

In deciding whether plaintiff is entitled to declaratory judgment, the determination made by the IRS is reviewed *de novo* by the court in both initial classification and revocation cases. *Exempt Organizations* at V(D)(1) (stating that declaratory judgment cases are "reviewed *de novo* by the court," but noting that "the scope of review in initial qualification and classification cases is limited to the administrative record"); *New Dynamics Found. v. United States* (*New Dynamics*), 70 Fed. Cl. 782, 795 (2006).

2. Burden of Proof on Plaintiff

Courts have recognized that exemptions from tax are matters of "legislative grace," and, accordingly, the burden of establishing entitlement to an exemption is on the taxpayer. *See, e.g.*, *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 854 (10th Cir. 1973) (citing *Dickinson v. United States*, 346 U.S. 389 (1953)); *Church of the Visible Intelligence*, 4 Cl. Ct. at 65 ("Exemption from taxation as a church is not a right, but a matter of legislative grace."). An organization's mere declaration that it is a church is insufficient; plaintiff must demonstrate its qualification for tax-exempt status as a church. *Church of the Visible Intelligence*, 4 Cl. Ct. at 65. In revocation cases, the ultimate issue is "'whether the defendant properly revoked the plaintiff's exemption . . . [and] the burden of proof is on plaintiff to establish that such revocation was erroneous." *St. Matthew Publish-*

ing, 41 Fed. Cl. at 146 (quoting *Animal Prot. Inst., Inc. v. United States* (*Animal Protection*), 1978 WL 4201 *6-*7 (Ct. Cl. Trial Div. 1978)); *Synanon Church v. United States* (*Synanon*), 557 F. Supp. 1329, 1334 n.6 (D.D.C. 1983) ("In a suit to overturn a determination to revoke exempt status, plaintiff has the burden of proof to establish that revocation was erroneous.") (citing *Animal Protection*, 1978 WL 4201 at *6-*7).[8] As in tax refund cases, the standard of review in revocation cases is deferential. *St. Matthew Publishing*, 41 Fed. Cl. at 145 (a revocation case); *New Dynamics*, 70 Fed. Cl. at 795 (an initial qualification case in which the court stated, "the prior qualification determination made by the Secretary is entitled to . . . the presumption of correctness ordinarily applicable in tax refund cases, and indeed, the Secretary's formal interpretations of the statute remain entitled to appropriate deference"). Therefore, "[d]eterminations of the Commissioner [of the IRS] as to tax-exempt status are presumptively correct." *St. Matthew Pub-*

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[8] Several declaratory judgment cases discuss the requirement for this court to follow the Tax Court's lead on burden of proof rules in declaratory judgment actions. *See, e.g., New Dynamics Found. v. United States* (*New Dynamics*), 70 Fed. Cl. 782, 799 n.23 (2006) (stating that the legislative history of § 7428 "indicates that 'burden-of-proof rules are to be developed by the courts under their rule-making powers,' [and] . . . that '[i]nsofar as is practical, those rules should conform to the rules that the Tax Court develops with regard to declaratory judgment suits as to retirement plans, under section 7476'" (quoting S. Rep. 94-938(I), at 588) (alterations in original)). As in *New Dynamics*, the court need not resolve the extent to which the Tax Court's rules should impact a declaratory judgment proceeding in this court because here, as in *New Dynamics*, there appears to be no dispute that the burden is on plaintiff to demonstrate that defendant's revocation was erroneous. *New Dynamics*, 70 Fed. Cl. at 799 n.23.

lishing, 41 Fed. Cl. at 145 (a revocation case); *see also Church of Spiritual Technology*, 26 Cl. Ct. at 729 (analyzing plaintiff's qualification as a religious organization in an initial classification case and stating that "[i]ncome tax exemptions must be strictly construed, with any doubts to be resolved in favor of the taxing entity. . . . [sic] [and that] [c]onsequently, determinations of the Commissioner are presumed correct."). The parties agree that, although there exists a presumption of correctness in favor of defendant under *St. Matthew Publishing*, the applicability of *de novo* review, coupled with the burden of proof rules applicable in revocation cases such as this, together dictate that if "the party bearing the burden of proof [fails] to carry its burden, . . . the other party will prevail." Pl.'s Supp. Br. 4; Oral Argument of May 27, 2009, Argument of Mr. Michael Roney at 9:49:50;[9] Tr. 35:10-15 (Roney) (agreeing with plaintiff's characterization of the interaction between the presumption of correctness, *de novo* review, and burdens of proof in revocation cases).

3. Supplementation of Administrative Record in Revocation Cases

The applicable scope of review in revocation cases differs from the scope of review in initial determination cases. *See Universal Life Church, Inc. v. United States* (*Universal Life Church*), 13 Cl. Ct. 567, 569 n.1 (1987) (comparing types of evidence acceptable in revocation cases to permissible evidence in initial qualification cases), *aff'd* 862 F.2d 321 (Fed. Cir. 1988) (Table); *Exempt Organizations* at V(D)(1)-(2) (same).

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[9] The oral argument held on May 27, 2009 was recorded by the court's Electronic Digital Recording system (EDR). All times noted in this Opinion refer to the EDR record of the oral argument.

Specifically, the IRS's determination of a taxpayer's initial qualification for tax-exempt status is based solely upon the administrative record which contains factual assertions made by the taxpayer in its petition for exempt status. *Animal Protection*, 1978 WL 4201, at *6. Accordingly, the scope of review in initial classification cases brought pursuant to § 7428 is generally limited to the administrative record generated before the IRS.[10] *See Universal Life Church*, 13 Cl. Ct. at 569 n.1 (comparing types of evidence acceptable in revocation cases to permissible evidence in initial qualification cases); *Exempt Organizations* at V(D)(1) ("[T]he scope of review in initial qualification and classification cases is limited to the administrative record . . . ."). However, "[i]n a revocation action . . . the [Internal Revenue] Service need not rely on the factual assertions made by the taxpayer in its petition, but may make an independent evaluation of the facts (after an audit)." *St. Matthew Publishing*, 41 Fed. Cl. at 146 (discussing the applicable scope of review in revocation cases).

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[10] Although the scope of review in declaratory judgment actions involving a taxpayer's challenge to an initial determination by the IRS is generally confined to the administrative record, supplementation of the administrative record may be proper when good cause is shown. Peter H. Winslow, T.M.P. 885-2nd: *Exempt Organizations—Declaratory Judgments (Exempt Organizations)* at V(D)(I)(c) (2008) (discussing the good cause exception for supplementation of the administrative record in initial classification cases); Rule 217(a) of the United States Tax Court Rules of Practice and Procedure (listing good cause exception); *Bethel Conservative Mennonite Church v. Comm'r*, 746 F.2d 388, 392 (7th Cir. 1984) (reviewing a decision by the Tax Court in an initial qualification case and determining that good cause was shown to justify supplementation of the administrative record in a case in which "the question before the Tax Court is one implicating a religion's practices or beliefs").

"[D]isposition on the basis of the administrative record alone will be made only where the parties agree that the record contains all relevant facts and that they are not in dispute." *Id.* Therefore, "[i]n revocation proceedings before this court under I.R.C. § 7428, the parties may supplement the administrative record." *Universal Life Church*, 13 Cl. Ct. at 569 n.1 (citing *Animal Protection*, 1978 WL 4201, at *5). In a revocation action, "the mere fact that items of evidence are contained in the administrative record does not establish the truth of their contents. Admissibility of such evidence for the purpose of establishing the truth of their contents [is] governed by the Federal Rules of Evidence." *Animal Protection*, 1978 WL 4201, at *7.

4. Evidence Restricted to Tax Years 1998-2000

The revocation of plaintiff's church status was based on defendant's audit of plaintiff's activities during tax years 1998, 1999, and 2000. Def.'s Supp. Brief 36 ("The period examined by the IRS [was] January 1, 1998 until December 31, 2000."). Following defendant's audit of plaintiff, plaintiff retained its § 501(c)(3) tax-exempt status. Def.'s Supp. Br. Ex. A (IRS Letter to Plaintiff dated September 12, 2004) 1 ("Your tax-exempt status under section 501(c)(3) is not affected."). Although plaintiff retained its non private foundation status under section 509(a)(1), that status was retained because of plaintiff's qualification as a publicly supported charity under § 170(b)(1)(A)(vi), and not as a church under § 170(b)(1)(A)(i). *Id.* ("We have modified your foundation status to that of a public charity described in sections 509(a)(1) and 170(b)(1)(A)(vi) of the Code."); Def.'s Mot. 5 ("[T]he Commissioner has ruled that [p]laintiff is a publicly supported organization described in 170(b)(1)(A)([vi]. . . .").

Case law dictates, and the parties agree, that because defendant's revocation of plaintiff's church status was based on the three years audited by the IRS, this court's declaratory judgment power, and therefore its review of the facts in this case, is limited to plaintiff's activities during the fiscal years 1998, 1999, and 2000. Def.'s Supp. Br. 37 ("Since the [c]ourt may review only those years under audit, the appropriate scope of evidence is limited to evidence pertaining to those years."); Pl.'s Supp. Br. 3 ("[E]vidence of tax-exempt status should relate to the audit period . . . ."); Oral Argument of May 27, 2009, Argument of Mr. Marc Sellers at 9:15:23-43; Tr. 15:4-8 (Sellers) ("To the extent that evidence . . . d[oes] not pertain to the tax years in question it would not be relevant to the court's determination [of plaintiff's present declaratory judgment action]."); Oral Argument of May 27, 2009, Argument of Mr. Michael Roney at 9:41:59; Tr. 35:16-18 (Roney) (agreeing with plaintiff's description of scope of relevant evidence). In *Synanon*, the plaintiff filed suit in the United States District Court for the District of Columbia following defendant's revocation of the plaintiff's tax-exempt status, seeking a declaratory judgment under § 7428 that the plaintiff qualified as a tax-exempt organization under I.R.C. § 501(a) (2006). *Synanon*, 557 F. Supp. at 1330. The IRS revoked the *Synanon* plaintiff's tax-exempt status following an audit of the organization's activities during the fiscal years 1977 and 1978. *Id.* at 1332. The plaintiff enjoyed tax-exempt status for all fiscal years prior to the audit. *Id.* When the *Synanon* plaintiff brought suit for a declaratory judgment regarding its entitlement to tax-exempt status for all years after fiscal year 1976, the court ruled that it lacked subject matter jurisdiction over any years outside the scope of the years which were

the subject of defendant's audit. *Id.* at 1332-33. Because the IRS's revocation was not a final and prospective determination, the *Synanon* court concluded that the plaintiff had not fulfilled the § 7428(b)(2) requirement that a taxpayer exhaust all available administrative remedies before filing suit for declaratory judgment in the district court. *Id.* Explaining that "each tax year constitutes a separate cause of action," the court held that the defendant's determination did not "eliminat[e] any requirement for plaintiff to seek further administrative relief. Rather, it shift[ed] to plaintiff the burden of taking further action to restore its exempt status." *Id.*

Here, as in *Synanon*, if plaintiff believes that it should be declared exempt for any tax years subsequent to those which formed the subject of defendant's audit, "it should petition for exempt status for those years. Until plaintiff so applies, the [Internal Revenue] Service cannot make a determination with respect to those years. Absent a determination, there is nothing for the [c]ourt to review."[11] *See id.* (citation omitted).

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[11] Plaintiff argued in briefing that activities outside the scope of the tax years at issue should be reviewed by the court. Pl.'s Mem. 3. Plaintiff did not support its argument with case law, but instead rested its argument on one sentence in a treatise. Pl.'s Mem. 3 (quoting *Exempt Organizations* at V(D)(2) ("[Despite the holding in *Synanon Church v. United States* (*Synanon*), 557 F. Supp. 1329 (D.D.C. 1983)], the courts should consider any evidence concerning current operations presented by the organization to the IRS and included in the administrative record, even though this evidence does not relate to the years under audit."). The court understands plaintiff's position in briefing to have been abandoned by plaintiff's concession at oral argument. *See* Oral Argument of May 27, 2009, Argument of Mr. Marc Sellers at 9:15:23-43; Tr. 15:4-8 (Sellers) ("To the

5. Plaintiff's Qualification for Church Status Under I.R.C. § 170(b)(1)(A)(i) Is the Sole Issue Before the Court

a. The Court's Review Does Not Judge Plaintiff's Religious Beliefs

The sole issue before the court is whether plaintiff qualifies as a church described in § 170(b)(1)(A)(i). *See supra* Part I.B. Several courts have acknowledged the possible First Amendment concerns that may arise when determining a taxpayer's qualification as a "church" under § 170. In *Church of the Visible Intelligence*, the United States Claims Court stated that the lack of Congressional guidance in providing a ready distinction between the term "church" and the term "religious organization" for purposes of interpreting the Code was likely due to First Amendment concerns. *Church of the Visible Intelligence*, 4 Cl. Ct. at 64. In *Foundation I*, the Tax Court cautioned against unduly expanding a court's scope of inquiry when making a declaration regarding a taxpayer's classification as a church, stating, "We must recognize that one person's prophet is another's pariah. Consequently, we must also assiduously avoid expanding our inquiry into the merits of petitioner's beliefs or risk running afoul of First Amendment religious protections." *Foundation I*, 88 T.C. at 1357 (citations omitted).

Foundation, like the plaintiff in *American Guidance Foundation, Inc. v. United States* (*American Guidance*), holds benefits derived from its status as a tax-exempt organization under §§ 501(c)(3) and 509(a) which "are

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extent that evidence. . . d[oes] not pertain to the tax years in question it would not be relevant to the court's determination [of plaintiff's present declaratory judgment action].").

not in jeopardy." *See American Guidance*, 490 F. Supp. 304, 306 (D.D.C. 1980). Here, as in *American Guidance*, defendant agrees that plaintiff is a religious organization. Def.'s Mot. 5 ("The Commissioner of Internal Revenue has ruled that [p]laintiff is a religious organization described in I.R.C. § 501(c)(3). . . ."); *see American Guidance,* 490 F. Supp. at 306. Therefore, "[d]ifficult issues involving what constitutes sincere religious belief or practice, and how to avoid enforcing religious orthodoxy through the tax laws need not be faced." *American Guidance*, 490 F. Supp. at 306; *see also Chapman v. Comm'r* (*Chapman*), 48 T.C. 358, 361 (1967) (deciding whether taxpayer organization qualified as a church, educational organization, or hospital within § 170(b)(1)(A)(i)-(iii) and stating that "we are not here concerned with the question as to what constitutes a 'religion' within the purview of the first amendment of the Constitution"). Here, as in *Spiritual Outreach II*, the court can make a declaration as to plaintiff's church status based on a review of plaintiff's activities without judging the sincerity of plaintiff's religious beliefs. *See Spiritual Outreach II*, 927 F.2d 335, 339 (8th Cir. 1991) (holding that plaintiff was not a church for federal tax purposes even though "there [wa]s no doubt that [plaintiff] [wa]s engaged in sincere religious activity"); *Universal Life Church*, 13 Cl. Ct. at 580 (reviewing IRS's revocation of plaintiff's 501(c)(3) status and stating, "It is not within the court's purview to judge in this motion the legitimacy of plaintiff's religion. However, it is legitimate for the court to review plaintiff's [tax-exempt] status").

The court is not here called upon to determine constitutional questions, nor is it called upon to determine the "philosophical, theological, or ecclesiastical refinements" of the term "church." *See*

Chapman, 48 T.C. at 368 (Tannenwald, J., concurring). Instead, the court here deals with a much narrower issue: plaintiff's qualification as a "church," as the term is understood for the purpose of determining tax-exempt status under the Code.

b. The Court Does Not Reach the Constitutionality of Defendant's Action

Plaintiff makes vague allegations in its briefing regarding the constitutionality of defendant's criteria for determining qualification of a taxpayer for church status under § 170(b)(1)(A)(i) and the application of those criteria to plaintiff. *See, e.g.*, Pl.'s Mem. 18-19. Plaintiff's statements of concern appear, as defendant suggests, to be criticisms of defendant's examination of various factual elements customarily considered when determining church status, rather than criticisms of the exemption given to churches. *See id.* Of course, an attack on the exemption itself would, if successful, eliminate the category within which plaintiff seeks to be classified. Def.'s Reply 2 n. 1.

While the government "may constitutionally tax the income of religious organizations [and] may decide not to exercise this power and grant reasonable exemptions to qualifying organizations while continuing to tax those who fail to meet these qualifications," *The Ecclesiastical Order of the ISM of AM, Inc. v. Comm'r* (*Ecclesiastical Order*), 80 T.C. 833, 841-42 (1983) (citing *Parker v. Comm'r*, 365 F.2d 792, 795 (8th Cir. 1966)), unconstitutional discrimination may nevertheless arise "if benefits granted to one religious group are denied to others of essentially the same class," *id.* at 842.

In this case, plaintiff's First Amendment concerns are stated in a conclusory fashion, and not fully

briefed by either party. *See* Pl.'s Mem. *passim*; Def.'s Mot. *passim*; Pl.'s Reply *passim*; *see also Hernandez v. Comm'r*, 490 U.S. 680, 695 (1989) (holding that the charitable contribution provisions of I.R.C. § 170 (2006) did not violate the First Amendment's establishment and free exercise clauses after establishing the applicable analytical framework for such claims which includes an "initial inquiry [into] whether the law facially differentiates among religions [and] if no such facial preference exists, . . . [an application of] the customary three-pronged Establishment Clause inquiry derived from *Lemon v. Kurtzman*, 403 U.S. 602, . . . (1971)"). Constitutional jurisprudence dictates that a court refrain from deciding a constitutional issue that, as in this case, is not squarely before the court. *See, e.g., Oil, Chem. & Atomic Workers Int'l Union v. Missouri*, 361 U.S. 363, 370 (1960) ("'Constitutional questions are not to be dealt with abstractly'. . . . They will not be anticipated but will be dealt with only as they are appropriately raised upon a record before us.") (quoting *Allen-Bradley Local v. Wis. Board*, 315 U.S. 740, 746 (1942)); *Kessler v. Comm'r* (*Kessler*), 87 T.C. 1285, 1293-94 (1986) (discussing a taxpayer's claims that § 170 is unconstitutional and stating "We will not guess at claims of unconstitutionality. It is a serious business to consider whether the Nation's legislature has violated the Constitution under which it is established and under which it acts."). The court, therefore, regards plaintiff's conclusory and glancing First Amendment arguments as outside the scope of this opinion. *See Kessler*, 87 T.C. at 1294 (refusing to decide constitutional issues "unless they are properly presented and must be decided in order to determine whether petitioners [are entitled to the relief requested]"); *cf. United States v. Holmes*, 614 F.2d 985, 989 (5th Cir.

1980) (noting that "ordinarily [a court] should refrain from constitutional adjudication where statutory interpretation or application will suffice," but going on to provide a "constitutional compass" in part because the constitutional issues had been fully briefed by the parties).

Having established that plaintiff's constitutional concerns are not squarely before the court here, the court notes that it is, and believes it should be, uncomfortable with the criteria used by the IRS for determination of the church status of religious organizations. *See generally*, Tr. 42:8-47:17 (colloquy between the court and defendant about the definition of church and the Establishment Clause).

In its 2008 U.S. Religious Landscape Survey (Survey), the Pew Forum on Religion and Public Life found that "religious affiliation in the U.S. is both very diverse and extremely fluid." The Pew Forum On Religion and Public Life, *U.S. Religious Landscape Survey* 5 (Feb. 25, 2008), available at http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf (last visited June 22, 2009). The Survey includes a brief history of the role of religion in the United States Censuses. *Id.* at 108. The Survey states that census takers in the United States began asking questions about religious organizations in 1850. *Id.* Subsequent to the establishment of the U.S. Census Bureau in 1902 and the statutory creation of the Census of Religious Bodies as a stand-alone census in 1906, the first Census of Religious Bodies asked many of the same questions as earlier censuses. *Id.* These questions included "year the congregations were established; . . . number of ministers and their salaries; number of congregation-operated schools, teachers, scholars and officers; and demographic

characteristics of congregation members." *Id.* "The ultimate demise [of the Census of Religious Bodies] in 1956 stemmed in part from a growing public debate over the propriety, merit and feasibility of the Census Bureau asking questions about religion." *Id.* at 109. Those who opposed questions on religion voiced concerns about "the protection of religious liberty and privacy rights, and whether the government was overstepping the constitutional boundaries separating church and state." *Id.*

The criteria used by the IRS to determine church status for tax purposes, *see infra* Part IV.A.2, bear a striking similarity to the topics of the questions contained in the 1906 Census of Religious Bodies. This resemblance strongly suggests that defendant's criteria are time-conditioned and reflect institutional characteristics that no longer capture the variety of American religions and religious institutions in the twenty-first century. The regime appears to favor some forms of religious expression over others in a manner in which, if not inconsistent with the letter of the Constitution, the court finds troubling when considered in light of the constitutional protections of the Establishment and Free Exercise Clauses.

IV. Discussion

A. Applicable Tests

Several courts have recognized that "there is very little guidance for courts to use in making decisions [as to church status]." *Spiritual Outreach II*, 927 F.2d at 338 (describing the determination of a taxpayer's church status as a "difficult procedure" and stating that "deciding what constitutes a church for federal tax purposes is not an easy task"); *Church of the Visible Intelligence*, 4 Cl. Ct. at 64 ("While federal tax authorities must apply the word church in a variety

of contexts, there is no ready definition of it."); *see also* Bruce R. Hopkins, *The Law of Tax-Exempt Organizations* § 10.3, at 320 (9th ed. 2007) ("[A] formal and consistent definition of the term *church* . . . appears incapable of formulation.") (emphasis in original).

The United States Supreme Court has discussed the definition of the term "church" in an opinion involving an exemption from unemployment compensation taxes imposed by the Federal Unemployment Tax Act (FUTA). *St. Martin Evangelical Lutheran Church v. South Dakota (St. Martin)*, 451 U.S. 772, 780-85 (1981). Although the Court held that, for purposes of § 3309(b) of the FUTA, the term "must be construed to refer to the congregation or the hierarchy itself, that is, the church authorities," *id.* at 784, the Court also expressly "disavow[ed] any intimations in this case defining or limiting what constitutes a church under FUTA or under any other provision of the Internal Revenue Code," *id.* at 784 n.15.

"The Internal Revenue Code is silent as to the definition of the term 'church,' as are the regulations promulgated under section 170." *VIA v. Comm'r* (VIA), 68 T.C.M. (CCH) 212, 215 (1994); *see also American Guidance*, 490 F. Supp. at 306 (discussing the definition of the term "church" and stating "Congress has offered virtually no guidance as to precisely what is meant"); *Church of the Visible Intelligence*, 4 Cl. Ct. at 64 ("The IRS has followed the lead of Congress and does not define a church in its regulations, either.").

The United States District Court for the District of Columbia examined the definition of the term "church" in a declaratory judgment suit in *American Guidance*. Despite the fact that almost thirty years have passed since the court's opinion in *American Guidance*, it remains true that "a coherent definition [of the term

does not] emerge from reviewing . . . the limited instances of judicial treatment." *American Guidance*, 490 F. Supp. at 306. Although there remains no formal definition of the term "church" for federal tax purposes, it is well established that Congress intended the definition of a "church" to be more restrictive than the definition of a "religious organization" within the United States Tax Code. *Id.*; *Church of Spiritual Technology*, 26 Cl. Ct. at 731. Therefore, "[a]lthough every church may be a religious organization, not every religious organization is a church." *Foundation I*, 88 T.C. at 1356 (citing *Chapman v. Comm'r* (*Chapman*), 48 T.C. 358, 363 (1967)).

In the absence of Congressional guidance and without any guidance from within the regulations themselves, courts have developed at least three different approaches to determine whether a taxpayer qualifies as a "church" for purposes of section 170(b)(1)(A)(i). *See VIA*, 68 T.C.M. (CCH) at 215 ("Without a definitive response from Congress or the Treasury Department as to the definition of a church, our task is to decide the issue on a case-by-case basis.").

1. The *De La Salle* Approach

In *De La Salle Institute v. United States* (*De La Salle*), the United States District Court for the Northern District of California heard a suit brought by an organization contending that it was exempt from taxation imposed upon its unrelated business income due to its qualification as a church under I.R.C. § 511(a)(2)(A). *De La Salle*, 195 F. Supp. 891, 898 (N.D. Cal. 1961). The court in *De La Salle* concluded that in the absence of a Congressional definition of the term "church," the term is properly defined by "the common meaning and usage of the word." *Id.* at 903. In decisions subsequent to *De La Salle*, courts

have declined to adopt the approach taken by the *De La Salle* court. *See, e.g.*, *Foundation I*, 88 T.C. at 1356 ("Given the plurality of religious beliefs in this country, the validity of [the *De La Salle*] approach is not without doubt."); *Spiritual Outreach II*, 927 F.2d at 339 n.6 (declining to comment on the validity of the *De La Salle* approach); *Lutheran Social Serv. of Minn. v. United States* (*Lutheran Social Service*), 758 F.2d 1283, 1287 n.4 (8th Cir. 1985) (refusing to express an opinion on the approach taken in *De La Salle* and noting that the Supreme Court has neither endorsed nor rejected the *De La Salle* approach). In *American Guidance*, the court stated that a general or traditional understanding of the term is elusive because "[t]here is no bright line beyond which certain organized activities undertaken for religious purposes coalesce into a 'church' structure[,] . . . [a]nd the range of 'church' structures extant in the United States is enormously diverse and confusing." *American Guidance*, 490 F. Supp. at 306 (declining to adopt the *De La Salle* test).

The court agrees with the reasoning of the cases subsequent to *De La Salle*, and likewise declines to adopt the *De La Salle* approach.[12]

2. The IRS's Fourteen Criteria

Several district courts have applied, without explicitly adopting, a fourteen-criteria standard introduced in 1977 by Jerome Kurtz, then Commissioner of Internal

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[12] In *De La Salle Institute v. United States* (*De La Salle*), the court discussed the legislative history of I.R.C. § 170. *De La Salle*, 195 F. Supp. 891, 906-07 (N.D. Cal. 1961). However, that case dealt with a plaintiff's qualification as a church for purposes of I.R.C. § 511(a)(2)(A) (2006), and not with the statutes at issue in this case, §§ 509(a)(1) and 170(b)(1)(A)(i). *See id.*

Revenue, and thereafter applied by the IRS to evaluate whether an organization qualifies for church status pursuant to § 170(b)(1)(A)(i). Bruce R. Hopkins, *The Law of Tax-Exempt Organizations* § 10.3, at 316-318 (9th ed. 2007) (describing the introduction of the criteria in 1977 and stating, "courts are evidencing acceptance of the IRS criteria."); Pl.'s Mem. 17; Def.'s Mot. 18. The Tax Court has applied the fourteen criteria in several cases. *See, e.g.*, *First Church of In Theo v. Comm'r* (*First Church of In Theo*), 56 T.C.M. (CCH) 1045, 1049 (1989) (applying the fourteen criteria); *Foundation I*, 88 T.C. at 1355-61 (same). The United States District Court for the District of Columbia has also followed suit. *See American Guidance*, 490 F. Supp. at 306-07 (applying the fourteen criteria). This court has done the same. *See Church of the Visible Intelligence*, 4 Cl. Ct. at 64-65 (applying the fourteen criteria).[13]

The United States Court of Appeals for the Eighth Circuit (Eighth Circuit) similarly views the fourteen criteria "as a guide, helpful in deciding what constitutes a church." *Spiritual Outreach II*, 927 F.2d at 339; *see also Lutheran Social Service*, 758 F.2d at 1286 (applying the fourteen criteria to determine church status under § 6033(a)(2)(A)(i) after stating that "[s]ection 6033 does not define the term 'church,' and the Treasury regulations to that section make no

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[13] Federal district courts have also applied the IRS's fourteen criteria in cases involving claims under statutes other than I.R.C. §§ 509(a)(1) and 170(b)(1)(A)(i). *See, e.g., Goetz v. Greater Ga. Life Ins. Co.*, 554 F. Supp. 2d 831, 834-37 (E.D. Tenn. 2008) (applying the fourteen criteria in a determination involving the Employee Retirement Income Security Act (ERISA) while acknowledging that the criteria "are not part of ERISA" and stating that "unfortunately, ERISA does not define 'church'").

attempt to clarify the term"). In *United States v. Jeffries* (*Jeffries*), the United States Court of Appeals for the Seventh Circuit (Seventh Circuit) adopted the same approach as the Eighth Circuit. *Jeffries*, 854 F.2d 254, 258 (7th Cir. 1988) (considering the fourteen IRS criteria helpful in determining what is a tax-exempt church).

Plaintiff is not required to meet each criterion in order to obtain classification as a church for federal tax purposes. *Spiritual Outreach II*, 927 F.2d at 339 ("Each criterion need not be met for an organization to be a church."); *Foundation I*, 88 T.C. at 1358 ("It is recognized that few traditional churches could meet all of the criteria. None of the criteria is considered controlling. . . ."). Moreover, here, as in *Foundation I*, the court views these criteria neither as "exclusive [nor as] mechanically applied, but, rather, [to] serve as a list of some of the characteristics that may be used in determining whether an organization is a church." *Foundation I*, 88 T.C. at 1350. Accordingly, "any other facts and circumstances which may bear upon an organization's claim that it is entitled to church status must also be taken into consideration."[14] *Id.*

Here, as in *Church of the Visible Intelligence*, the court applies the fourteen criteria developed by the IRS and used by this court as a guide in evaluating

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[14] In plaintiff's Memorandum, plaintiff treats the court's consideration of "any other facts and circumstances," *Foundation I*, 88 T.C. at 1350, as a fifteenth factor. Pl.'s Mem. 26. The court regards plaintiff's arguments in this portion of plaintiff's Memorandum as relevant to the "regular congregation" and "regular religious services" criteria, and therefore addresses plaintiff's arguments in Part IV.B.1.m-n *infra*.

plaintiff's § 170(b)(1)(A)(i) status. The fourteen criteria are:

(1) a distinct legal existence;

(2) a recognized creed and form of worship;

(3) a definite and distinct ecclesiastical government;

(4) a formal code of doctrine and discipline;

(5) a distinct religious history;

(6) a membership not associated with any church or denomination;

(7) an organization of ordained ministers;

(8) ordained ministers selected after completing prescribed studies;

(9) a literature of its own;

(10) established places of worship;

(11) regular congregations;

(12) regular religious services;

(13) Sunday schools for the religious instruction of the young; and

(14) schools for the preparation of its ministers.

Church of the Visible Intelligence, 4 Cl. Ct. at 64-65 (applying the fourteen criteria).

Due partly to concerns over a mechanical application of rigid criteria to a diverse set of religious organizations, some courts have deemed a few of the criteria within the fourteen-factor IRS test to be of special, or "central" importance. The leading case is *American Guidance*, in which the United States District Court for the District of Columbia articulated the following standard:

> While some of the [fourteen criteria applied by the IRS] are relatively minor, others, e.g.[,] the existence of an established congregation served by an organized ministry, the provision of regular religious services and religious education for the young, and the dissemination of a doctrinal code, are of central importance.

American Guidance, 490 F. Supp. at 306; *see also Foundation I*, 88 T.C. at 1357 (adopting and applying the factors deemed most critical in *American Guidance*); *Spiritual Outreach II*, 927 F.2d at 339 ("[T]here are certain of the [fourteen] criteria upon which we place a special emphasis."). In *Spiritual Outreach II*, the Eighth Circuit explained its approach when stating, "We are mindful of [the plaintiffs] claim that the criteria discriminate unfairly against rural, newly-formed churches which lack the monetary resources held by other churches. [The plaintiff] is not alone in this position. In large part it is for this reason we have emphasized what we view as the core requirements of the fourteen criteria." *Spiritual Outreach II*, 927 F.2d at 339 (footnote omitted). The "core requirements" applied in *Spiritual Outreach II* were first applied by the Eighth Circuit in *Lutheran Social Service*, where the Eighth Circuit applied the test formulated by the United States District Court for the District of Columbia in *American Guidance*. *See Lutheran Social Service*, 758 F.2d at 1287 (adopting the *American Guidance* test). The Seventh Circuit has also adopted the language of *American Guidance*. *See Jeffries*, 854 F.2d at 258 (same).

The court shares prior courts' concerns over a mechanical application of rigid criteria to a diverse set of religious organizations. However, it does not appear to the court that any problems resulting from

a mechanical application of the fourteen factors are likely to be ameliorated by determining that a lesser number of those factors, "the existence of an established congregation served by an organized ministry, the provision of regular religious services and religious education for the young, and the dissemination of a doctrinal code, are of "central importance." *See American Guidance*, 490 F. Supp. at 306.[15]

3. The Associational Test

Courts have also followed *American Guidance* in finding that a "church" may be distinguished from other religious organizations by fulfillment of an "associational role:"

> The means by which an avowedly religious purpose is accomplished separates a "church" from other forms of religious enterprise. At a minimum, a church includes a body of believers or communicants that assembles regularly in order to worship. Unless the organization is reasonably available to the public in its conduct of worship, its educational instruction, and its promulgation of doctrine, it cannot fulfill this associational role.

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[15] In the choice of criteria deemed to be of "central importance," it is possible to hear echoes of the concerns which informed the establishment of Protestant institutions in the colonial and early national periods, including the founding of Harvard University, "'to advance *Learning* and perpetuate it to *Posterity;* dreading to leave an illiterate Ministry to the Churches[,]'" Samuel Eliot Morison, *Three Centuries of Harvard 1636-1936* at 23 (Harvard Univ. Press 1936) (quoting *New Englands First Fruits* 23 (digitized by Google 2007) (London, printed by R.O. and G.D. for Henry Overton 1643), and the Sunday school movement, *see generally* Robert W. Lynn and Elliott Wright, *The Big Little School: Two Hundred Years of the Sunday School* (Abingdon Press 2d ed., rev. 1980).

American Guidance, 490 F. Supp. at 306 (citation omitted); *see also Foundation I*, 88 T.C. at 1360 (holding that plaintiff qualified as a church and stating, "Most of the factors considered to be of central importance are satisfied. [Plaintiff] possesses *associational aspects* that are much more than incidental.") (emphasis added); *Spiritual Outreach II*, 927 F.2d at 336 (affirming Tax Court's holding that plaintiff "neither fulfilled an *associational role* nor satisfied the listed requirements used by the IRS to determine church status") (emphasis added); *Spiritual Outreach I*, 58 T.C.M. (CCH) at 1287 (referring to the "critical associational factor"); *Church of Eternal Life and Liberty, Inc. v. Comm'r* (*Church of Eternal Life*), 86 T.C. 916, 924 (1986) ("To qualify as a church, an organization must serve an *associational role* in accomplishing its religious purposes.") (emphasis added); Def.'s Mot. 6; Pl.'s Mem. 16.

The parties' briefing addresses separately plaintiff's qualification for church status under the fourteen criteria and under the associational standard. *See* Def's [sic] Mot. 42; Pl.'s Mem. 16 (addressing associational test separately from the fourteen criteria); Pl.'s Reply 19 (same). After a discussion of cases which are readily distinguishable from plaintiff's case, this Opinion addresses the fourteen criteria and the associational standard.

4. Cases Readily Distinguishable From This Case

There are few cases which could provide guidance to the court on the legal issues presented in this case. That small number is further reduced by the limited persuasive usefulness of cases in which the fact patterns are readily distinguishable from this case.

First, this case is easily distinguishable from cases in which church status has been denied to organizations serving primarily secular functions. In one case, plaintiff, Junaluska Assembly Housing, Inc., was formed by the United Methodist Church as a separate corporation. *Junaluska Assembly Housing, Inc. v. Comm'r* (*Junaluska*), 86 T.C. 1114, 1117 (1986). Plaintiff's principal purpose was "to contract for the construction of temporary and permanent housing." *Id.* Therefore, despite its close relationship with and service to a religious organization with church status, plaintiff in that case did not qualify as a church in its own right. *Id.* at 1127. Similarly, in *Chapman*, the plaintiff seeking declaratory judgment was Missionary Dentist, a religious and charitable organization whose "underlying function . . . [was] to preach the Gospel around the world, using dentistry as a means by which to contact people." *Chapman*, 48 T.C. at 360.[16] While providing dental health care for communities in foreign countries, plaintiff's members conducted religious services and established small indigenous churches in the countries in which they visited. *Id.* at 360. The court denied plaintiff church status, stating that "petitioner cannot escape the fact that . . . a large part of the efforts of the Missionary Dentist was the furnishing of dental service, . . . and that its other activities, though considered important,

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[16] The majority opinion in *Chapman v. Commissioner* (*Chapman*) defines the term church as synonymous with the concepts of "denomination" or "sect." *Chapman*, 48 T.C. 358, 363 (1967). The parties do not advocate, and the court does not find, strong support in case law for the position taken by the majority in *Chapman*. *See* Pl.'s Mem. *passim*; Def.'s Mot. *passim*. The court follows the approach taken in the concurring opinion in *Chapman*.

were nevertheless accessorial." *Chapman*, 48 T.C. at 368 (Tannenwald, J., concurring).

In *Lutheran Social Service*, the plaintiff provided services including child care and adoption services, various counseling services, and residential treatment services to individuals within a variety of segments of its community, irrespective of the individuals' religious beliefs. *Lutheran Social Service*, 758 F.2d at 1285. Plaintiff's members were not required to counsel with any particular religious orientation when providing services. *Id.* at 1287. When viewed in light of the fourteen criteria, the court concluded that plaintiff in that case was "a social service agency and it could not become a church . . . merely by being affiliated with a church."[17] *Id.* ("Such services are secular in nature when performed by secular organizations, and cannot be transformed into 'ministrations of sacerdotal functions' merely because they are performed by a religiously affiliated social service organization like [plaintiff].").

Plaintiff in this case, however, cannot be properly analogized to either the social services agency in *Lutheran Social Service*, nor can it be accurately described as an organization serving primarily secular functions such as the contracting services provided by the plaintiff in *Junaluska* and the dentistry services provided by plaintiff in *Chapman*. The record makes clear that plaintiff serves a religious purpose. *See*

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[17] In *Lutheran Social Service of Minnesota v. United States* (*Lutheran Social Service*), the United States Court of Appeals for the Eighth Circuit applied the fourteen criteria to determine church status under § 6033(a)(2)(A)(i) after observing, "Section 6033 does not define the term 'church,' and the Treasury regulations to that section make no attempt to clarify the term." *Lutheran Social Service*, 758 F.2d at 1286 (8th Cir. 1985).

infra Part IV.B.1.n at n.23 (discussing plaintiff's status as a religious organization and describing its form of worship).

Second, plaintiff in this case presents a more robust institutional record than did individuals seeking declaratory judgments in cases where the courts characterized litigants as either individual or single-family private religious enterprises. In *Jeffries*, the Seventh Circuit held that an individual's "effort to create his one-person church" in that case did not qualify as a church in light of the fourteen IRS criteria. *Jeffries*, 854 F.2d at 258 ("[N]o matter the sincerity of his religious beliefs or the abundance of his religious contributions, [defendant] does not satisfy the tax code's reasonable criteria in whole or in part."). In *Richardson v. Commissioner* (*Richardson*), petitioner argued summarily that "because he believe[d] in the Bible, he qualifie[d] as a church." *Richardson*, 70 T.C.M. (CCH) 14, 16 (1995). The court held that one individual's declaration that he was a church was insufficient to gain church status. *Id.* ("A church cannot, for [f]ederal income tax purposes, consist of just one individual."). The court in *American Guidance* held that a family practicing their religion in their own home was not a church within the meaning of § 170. *American Guidance*, 490 F. Supp. at 306. Throughout its existence, the *American Guidance* plaintiff's membership was comprised of its founder and, at most, five members of his immediate family. *Id.* at 305. The religious worship of the plaintiff in *American Guidance* did not extend beyond the family's home. *Id.* at 307. Following an analysis of plaintiff's failure to meet several of the fourteen criteria, the court concluded that "plaintiff is engaged in a quintessentially private religious enterprise." *Id.* In a similar case, this court denied church status in a case

in which plaintiff satisfied few of the fourteen criteria, had a membership of only three individuals, and where the record was unclear as to whether those three individuals were members of the founder's family. *Church of the Visible Intelligence*, 4 Cl. Ct. at 65 ("If membership does not extend beyond Rutherford's immediate family, it would appear that plaintiff is engaged in a private religious enterprise, rather than a church.").

The evidence presented in these cases was held to be clearly insufficient to meet the criteria for church status. The facts presented in the record before the court in this case, however, establish that plaintiff's followers include more than a single individual. Def.'s Facts ¶ 41; Pl.'s Resp. to Def.'s Facts 34. The individual adherents extend beyond the founder's immediate family. Def.'s Facts ¶ 41; Pl.'s Resp. to Def.'s Facts 34. Plaintiff's meetings do not take place in a private family home, but rather at Tall Timber Ranch, a private property in Selma, Oregon, which plaintiff purchased in 1979. Def.'s Facts ¶ 16; Pl.'s Resp. to Def.'s Facts 13; Oral Argument of May 27, 2009, Argument of Mr. Marc Sellers at 9:02:16; Tr. 5:4-6 (Sellers) (clarifying that Tall Timber Ranch is not presently, and has not previously been, the residence of plaintiff's founder, Roy Masters), and 9:25:09; Tr. 22:21-5 (noting that no individual resides at Tall Timber Ranch).

B. Application of the Tests to Plaintiff

Upon an analysis of plaintiff's evidence in light of the fourteen criteria and the assocational [sic] test, and exercising as much caution as possible in order to avoid a mechanical application of the fourteen criteria, the court reaches the following conclusions.

1. The IRS's Fourteen Criteria

a. Independent Legal Existence

It is uncontested that plaintiff has an independent legal existence. Foundation is a California nonprofit corporation incorporated on June 17, 1963. Admin. Rec. 461.

b. Recognized Creed and Form of Worship

It is also uncontested that plaintiff has a recognized creed and form of worship. In *Foundation I*, the Tax Court found that plaintiff's "emphasis on emotional self-control through a specific type of meditation as the key to salvation sets [plaintiff] apart from other recognized religions." *Foundation I*, 88 T.C. at 1359. Defendant "does not challenge [p]laintiff's assertion that this finding satisfies this criterion" for the purposes of the present case. Def.'s Mot. 21.

c. Membership Not Associated With Any Other Church or Denomination

Plaintiff concedes that it does not have a membership unassociated with any other church or denomination. Pl.'s Reply 12 ("Defendant correctly states that plaintiff has no formal membership. Nor does [p]laintiff require that its congregants abandon affiliations with other churches or faiths."). Plaintiff does not require its followers to reject membership in other churches. *See* Pl.'s Mem. 7. Plaintiff has "thousands of Foundation adherents or followers who practice the meditation techniques, attend seminars, read the Foundation publications, including approximately 2,000 in the Grants Pass, Selma, Medford Area of [Oregon]." Def.'s Facts ¶ 41; Pl.'s Resp. to Def.'s Facts 34. However, despite having adherents or followers, plaintiff has no formal membership. Pl.'s Facts ¶ 9; Def.'s Resp. to Pl.'s Facts 13; *see also* Def.'s

Facts ¶ 41; Pl.'s Resp. to Def.'s Facts 34 ("The Foundation does not have members per se.").

d. Distinct Religious History

Plaintiff's evidence is sufficient to demonstrate its distinct religious history. At the time of the *Foundation I* decision, plaintiff already had "a distinct, if relatively short, religious history." *Foundation I*, 88 T.C. at 1359. "Spread[ing] one's religious beliefs is, undeniably, an integral part of many faiths." *Id.* at 1360. Plaintiff has made known its religious beliefs since its inception, and uses a variety of vehicles to disseminate its religious beliefs, including radio broadcasts and written publications. Joint. Stip. ¶¶ 26-7, 29. Plaintiff offers "phone-based religious counseling." Def.'s Facts ¶ 12; Pl.'s Resp. to Def.'s Facts 11. For a period of time prior to the *Foundation I* decision, Brighton Academy—an independent school formed by plaintiff's founder, but now unaffiliated with plaintiff—included religious instruction as part of its curriculum. *See* Def.'s Facts ¶ 24; Pl.'s Resp. to Def.'s Facts 19. Plaintiff has "thousands of Foundation adherents or followers who practice the meditation techniques, attend seminars, read the Foundation publications, including approximately 2,000 in the Grants Pass, Selma, Medford Area of Oregon." Def.'s Facts ¶ 41; Pl.'s Resp. to Def.'s Facts 34. Plaintiff has submitted evidence in the form of correspondence from its followers which establishes that plaintiff has a group of adherents who feel an affiliation with plaintiff and its message. *See infra* Part IV.B.1.m. Moreover, entities independent of Foundation also disseminate Roy Masters's teachings in Great Britain and Tanzania. Def.'s Facts ¶ 25; Pl.'s Resp. to Def.'s Facts 21.

e. Literature of Its Own

The administrative record reflects that plaintiff has a literature of its own. Plaintiff maintains an internet website at http://www.fhu.com/. Def.'s Facts ¶ 7; Pl.'s Resp. to Def.'s Facts 7. On its website, plaintiff sells materials authored by Roy Masters. Def.'s Facts ¶ 10; Pl.'s Resp. to Def.'s Facts 9. Among its offerings are "Sex Without Sin 1 & 2," "Overcoming Overeating," "Dealing Properly with Children," "How to Survive Your Wife & Mother," and How to Conquer Negative Emotions. Def.'s Facts ¶ 10; Pl.'s Resp. to Def.'s Facts 9-10. Plaintiff's offerings in audio format include "Love and Marriage," "Health and Addiction," "Family & Parenting," and "Christmas Special—Collector's Videos." Def.'s Facts ¶ 10; Pl.'s Resp. to Def.'s Facts 9-10. Plaintiff publishes a monthly newsletter, *New Insights*, which includes articles written by its founder, Roy Masters. Def.'s Facts ¶ 11; Pl.'s Resp. to Def.'s Facts 10. *New Insights* has a paid subscription list of 898 and is distributed free of charge to another 172 individuals. Def.'s Facts ¶ 11; Pl.'s Resp. to Def.'s Facts 10. Defendant's contention that plaintiff's literature is not "substantial" enough to qualify as a distinct religious literature is unpersuasive. *See* Def.'s Reply 13.

f. Established Place of Worship

Plaintiff has demonstrated that it has an established place of worship. Plaintiff's current headquarters is Tall Timber Ranch, a property in Selma, Oregon, which plaintiff purchased in 1979. *See* Def.'s Facts ¶ 16; Pl.'s Resp. to Def.'s Facts 13. During the meetings which take place at Tall Timber Ranch, "Foundation ministers conduct personal counseling; instruction in meditation techniques and self-awareness and otherwise present and discuss the . . . teachings of

the Foundation." *See* Pl.'s Facts ¶ 13; Def.'s Resp. to Pl.'s Facts 15.[18] Defendant contends that plaintiff does not meet this criterion, placing the weight of its argument on the fact that plaintiff sold two of the buildings it owned at the time of the decision in *Foundation I*. *See* Def.'s Reply 14-15. In 1982, plaintiff purchased a Seventh Day Adventist church building in Grants Pass, Oregon, which plaintiff used as a location for its activities. Def.'s Facts ¶ 13; Pl.'s Resp. to Def.'s Facts 12. Plaintiff put this building on the market in 1991 and sold it in 1994. Def.'s Facts ¶ 13; Pl.'s Resp. to Def.'s Facts 12. The parties agree that as of the time of the tax court decision in *Foundation I*, plaintiff owned a building in Los Angeles, California. *See* Def.'s Facts ¶ 15; Pl.'s Resp. to Def.'s Facts 13. Plaintiff held services which were open to the public three to four times a week at its Los Angeles, California location. Def.'s Facts ¶ 15; Pl.'s Resp. to Def.'s Facts 13. Plaintiff sold the Los Angeles, California building sometime in or before 1994. *See* Def.'s Facts ¶ 15; Pl.'s Resp. to Def.'s Facts 13. Plaintiff has not purchased any additional buildings for worship since that time. Def.'s Facts ¶ 13; Pl.'s Resp. to Def.'s Facts 12.

The court does not find defendant's argument persuasive. The case law does not dictate, nor does the

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[18] Defendant objects to plaintiff's use of the phrase "otherwise present and discuss," contesting that it is vague. *See* Defendant's Response to Plaintiff's Proposed Findings of Uncontroverted Fact (defendant's Response to plaintiff's Facts or Def.'s Resp. to Pl.'s Facts) 15. The court does not perceive the basis for defendant's objection. "[P]resent[ing]" and "discuss[ing]" are well understood to refer to specific activities. If defendant's objection is to the term "otherwise," it is clear from the titles of plaintiffs publications that there are many subjects that could be addressed.

court find, that a religious organization must have various places in which it conducts its activities in order to satisfy this criterion. Defendant also takes issue with the fact that plaintiff has not cited any evidence of the frequency of worship at this location. Def.'s Mot. 33 n.23. However, the frequency of worship at a particular location is not a consideration in the court's determination of this factor. *See, e.g.*, *Spiritual Outreach I*, 58 T.C.M. (CCH) at 1287 (discussing the factors that militated in favor of the plaintiff in that case, including the fact that plaintiff had "a building used for meditation and prayer"). For the foregoing reasons, the court finds that Tall Timber Ranch is plaintiff's place of worship.

g. Definite and Distinct Ecclesiastical Government

Plaintiff has presented evidence sufficient to establish that it has a definite and distinct ecclesiastical government. Plaintiff contends that it satisfies this requirement because its "board of directors and ministry have directed its operations from its inception." Pl.'s Mem. 20. Plaintiff further states that because the evidence shows that "[p]laintiff's affairs are governed by its [b]oard of [d]irectors . . . [which is] comprised of individuals including its ministers and its Founder," plaintiff satisfies this criterion. Pl.'s Supp. Br. 5-6. While plaintiff correctly states that case law does not "suggest any threshold governmental structure that would satisfy [this criterion]," Pl.'s Mem. 20, case law does provide that an ecclesiastical government is responsible for religious or doctrinal decisions. *See Foundation I*, 88 T.C. at 1359. While the portion of the record to which plaintiff points as evidence of this criterion, Pl.'s Supp. Br. 5, is not especially probative of the issue, *see* Admin. Rec. 690

(a board of directors [sic] resolution authorizing plaintiff's founder, Roy Masters, to determine legal validity of marriage contracts used by plaintiff in marriages it performs), other record evidence shows that plaintiff's board of directors is in fact made up of its ministers and founder. *See* Admin. Rec. 693-94 (Consent to Action taken by plaintiff's board of directors and signed by plaintiff's ministers in their capacity as directors). The corporate form of organization is definite and distinct and the court sees no reason to challenge plaintiff's assertion that the board of directors directs Foundation's operations. The founder and acknowledged spiritual leader is both a board member and the corporation's president, and it is clear that the doctrinal leadership emanates from the corporation, and, especially, the corporation's chief executive officer.

h. Formal Code of Doctrine and Discipline

Plaintiff has demonstrated that it satisfies this criterion. The IRS's church tax inquiry letter of October 16, 2001, asked the following question of Foundation: "Do you impose a formal code of doctrine upon your members? If so, is there any form of discipline (spiritual or otherwise) employed? Explain in detail." Def.'s Facts ¶ 41; Pl.'s Resp. to Def.'s Facts 33. Plaintiff's response to the IRS, sent November 21, 2001, was the following:

> The form of discipline which the Foundation teaches is an individual discipline in the meditative practices taught by Roy Masters, including understanding the true relationship of men and women toward God and toward each other and in their society. It is fundamental to the discipline as taught by the Foundation and Roy Masters that individuals overcome their own emotional impulses and societal influences, to take control

> of their lives through meditative practices and self-discipline. Those who fail to do so are at risk of both consciously and unconsciously being controlled by the forces of evil and society. This code of doctrine and discipline is set forth in detail in the writings of Roy Masters which are disseminated by the Foundation.

Def.'s Facts ¶ 41; Pl.'s Resp. to Def.'s Facts 34. Plaintiff also attached a statement of belief written by its founder, Roy Masters, as proof that Foundation meets this requirement. Admin. Rec. 7081-85. While plaintiff has not provided any evidence demonstrating its formal adoption of the doctrine or discipline described in either its response to the defendant's inquiry letter or in Roy Masters's statement, the court does not find that omission dispositive. The teachings of Roy Masters focus on an individual's ability to "take control of [his life] through . . . self-discipline . . . [in order to avoid] being controlled by the forces of evil and society." Def.'s Facts ¶ 41; Pl.'s Resp. to Def.'s Facts 34. One would not expect to find a doctrine such as plaintiff's—which emphasizes "self-discipline"—to be vindicated by external means. The "discipline" is the "risk of both consciously and unconsciously being controlled by the forces of evil." Def.'s Facts ¶ 41; Pl.'s Resp. to Def.'s Facts 34. The dissemination of plaintiff's beliefs through the writings of its founder are sufficiently formal to meet this requirement.

i. Organization of Ordained Ministers

The parties agree that during the tax years 1998 through 2000, the following members of the Masters family were ordained ministers of Foundation: Roy Masters, Ann Masters, David Masters, Dianne Masters Linderman, David Linderman, Elizabeth

Diane Linderman, and Michael Masters. Def.'s Facts ¶ 22; Pl.'s Resp. to Def.'s Facts 17. The administrative record contains Certificates of Ordination issued by plaintiff. Admin. Rec. 2796-2801. Plaintiff's Certificates of Ordination are signed by Roy Masters as president and Ann Masters as secretary. Def.'s Facts ¶ 22; Pl.'s Resp. to Def.'s Facts 17. Roy Masters's own Certificate of Ordination is signed by the following members of plaintiff's board: David Masters, Dianne Masters, Michael Masters, Lee Wendelbo, and David Negron. Def.'s Facts ¶ 22; Pl.'s Resp. to Def.'s Facts 18. The record also demonstrates that the following individuals were ordained ministers at the time of the church tax inquiry: Albert Munoz, Mel Colton, Joel Moskowitz, Gene Takamine, Steven Kefalianos, Lee Wendelbo, Robert L. Dennis, Steven Stillwell, and Delores Allmond. Pl.'s Reply Exhibit (Ex.) 1 (Supplemental Affidavit of Roy Masters) at 16251-57, 16259 (Certificates of Ordination). Plaintiff has demonstrated that it has an organization of ordained ministers. *Cf. Spiritual Outreach II*, 927 F.2d at 339 (finding that plaintiff failed to satisfy the organized ministry criteria, and stating, "[i]t appears that every minister who was involved in a function . . . was a guest minister from another church").

j. Schools for the Preparation of its Ministers

Plaintiff does not have schools for the preparation of its ministers. *See* Pl.'s Mem. *passim*.

k. Ministers Selected After Completing Prescribed Courses of Study

Plaintiff has adequately demonstrated that its ministers are selected after completing prescribed courses of study. The parties agree that the ordination process consists of a personal tutelage under plaintiff's

founder, Roy Masters. *See* Def.'s Facts ¶ 21; Pl.'s Resp. to Def.'s Facts 16. "There is no 'set curriculum' that sets out guidelines for the tutelage, and there is no set length of time [for the tutelage]." Def.'s Facts ¶ 21; Pl.'s Resp. to Def.'s Facts 17. A minister is ordained once Roy Masters is "personally satisfied' that the individual understands and can explain the doctrines of [Foundation] at a level that allows [the individual] to adequately represent the Foundation." Def.'s Facts ¶ 21; Pl.'s Resp. to Def.'s Facts 17. As a result, the tutelage can range from between a few months to several years of study. Def.'s Facts ¶ 21; Pl.'s Resp. to Def.'s Facts 17. In short, plaintiff relies on Roy Masters's subjective assessment regarding an individual's qualification for ordination. While the facts here are unlike those in *Foundation I*, where the Tax Court found that Foundation's ministers were ordained only after having completed a three-year apprenticeship under the tutelage of plaintiff's founder; *Foundation I*, 88 T.C. at 1348, the court disagrees with defendant's view that, in the absence of a clear path of study, plaintiff does not meet this factor. *See* Def.'s Reply 13. Defendant's argument reflects an image of a learned—often degreed—clergy that is familiar in some, but by no means all, religious traditions.

1. Religious Instruction for the Young

Plaintiff does not provide sufficient evidence to prove that it provides religious instruction for the young, whether through a church school or otherwise. *See* Pl.'s Mem. *passim*. Plaintiff does not provide a school for the religious training of the young. Pl.'s Mem. 12. Plaintiff contends that it meets this factor due to its relationship with Brighton Academy, and the religious nature of the education taught at

Brighton Academy. *See* Pl.'s Mem. 11, 26. However, record evidence supports the opposite conclusion.

Roy Masters and Foundation founded Brighton Academy, a school for children, in 1977. Def.'s Facts ¶ 24; Pl.'s Resp. to Def.'s Facts 19. The parties agree that Brighton Academy was separately incorporated in 1991, and is currently a legal entity separate from Foundation. *See* Def.'s Facts ¶ 24; Pl.'s Resp. to Def.'s Facts 19-20. Brighton Academy maintains an internet website at http://www.brightacademy.org/. Def.'s Facts ¶ 7; Pl.'s Resp. to Def.'s Facts 7. At its founding, Brighton Academy's classwork included religious instruction based on plaintiff's beliefs. Def.'s Facts ¶ 24; Pl.'s Resp. to Def.'s Facts 19. The school's current religious statement, however, does not mention Foundation or Roy Masters. Def.'s Facts ¶ 24; Pl.'s Resp. to Def.'s Facts 20. The religious statement, contained on its website, states in relevant part:

> Brighton Academy is a non-denominational Judeo-Christian school. We do not teach any specific religion and we firmly believe that it is the family's responsibility to establish and maintain it's [sic] own religious belief system.

Def.'s Facts ¶ 24 (alteration in original); Pl.'s Resp. to Def.'s Facts 20. Plaintiff has not provided any evidence to show that the religious curriculum taught at Brighton Academy reflects Foundation's practices or beliefs. *See* Pl.'s Mem. *passim*; Pl.'s Reply *passim*. In fact, plaintiff has not submitted any materials evidencing the school's religious curriculum. *See* Pl.'s Mem. *passim*; Pl.'s Reply *passim*. Moreover, the school's religious statement does not espouse the beliefs of Foundation or Roy Masters. *See* Admin. Rec. 7263 (Religious Statement of Brighton Academy). Instead, the statement states that Brighton

Academy "do[es] not teach any specific religion." *Id.* Plaintiff does not maintain a legal relationship with Brighton Academy. Admin. Rec. 7079 (plaintiff's statement that "Brighton Academy incorporated itself in 1991"). Although defendant does not contest that plaintiff's founder, Roy Masters, is a member of Brighton Academy's board of directors, *see* Def.'s Mot. *passim*; Def.'s Facts ¶ 24, this, without more, is insufficient to establish that plaintiff meets this criterion. There is simply no evidence before the court to support the conclusion that plaintiff provides religious instruction for the young at Brighton Academy.

m. Regular Congregation

Plaintiff relies heavily on evidence that is either irrelevant or inadmissible hearsay in its attempt to prove that it meets this criterion. The portion of plaintiff's proferred evidence which can be properly reviewed by the court is insufficient to establish plaintiff's satisfaction of this factor.

Plaintiff cites to and appears to rely on the portion of the opinion in *Foundation I* in which the Tax Court found that plaintiff held regular services of regular congregations consisting of 50 to 350 persons at its Los Angeles, California, and Grants Pass, Oregon headquarters. Pl.'s Mem. 24 (citing *Foundation I*, 88 T.C. at 1359). The facts before the Tax Court in 1987 are irrelevant to the court's present determination regarding plaintiff's activities subsequent to the *Foundation I* decision. Moreover, plaintiff does not offer any evidence that its activities are substantially the same as they were at the time of the *Foundation I* decision. *See* Pl.'s Mem. *passim*; Pl.'s Reply *passim*. Plaintiff sold the Grants Pass, Oregon church building in 1994. Def.'s Facts ¶ 13; Pl.'s Resp. to Def.'s Facts 12. Plaintiff also sold the Los Angeles, California

building sometime in or before 1994. *See* Def.'s Facts ¶ 15; Pl.'s Resp. to Def.'s Facts 13. Plaintiff has not purchased any buildings since that time. Def.'s Facts ¶ 13; Pl.'s Resp. to Def.'s Facts 12.

Plaintiff offers no evidence regarding the regularity, if any, with which the 50 to 350 congregants referred to in *Foundation I*, or any other established group of congregants, continued to practice together during the period of 1998 through 2000. *See* Pl.'s Mem. *passim*; Pl.'s Reply *passim*. On the contrary, the record makes clear that between 1998 and 2000, plaintiff offered only twenty-one seminars at a variety of locations, five of which were in Oregon. Def.'s Facts ¶ 27; Pl.'s Resp. to Def.'s Facts 22. The record also establishes that during the period of 1998-2000, Roy Masters experienced poor health, Def.'s Facts ¶ 26; Pl.'s Resp. to Def.'s Facts 21, and that, during this time, Sunday meetings became less frequent. Def.'s Facts ¶ 26; Pl.'s Resp. to Def.'s Facts 21.

Plaintiff's responses to defendant's church tax inquiry, although contained within the administrative record, consist of argument rather than fact. Those statements cannot therefore be marshaled to establish the facts. Plaintiff has not argued, and the court cannot determine, any exclusion from or exception to the hearsay rule under which these statements can be properly admitted as evidence before the court. Instead, they are out-of-court statements which plaintiff offers to prove the truth of the matters asserted. *See* Fed. R. Evid. 801(c). The court accordingly regards these statements as inadmissible hearsay, and does not consider plaintiff's arguments for which its only evidence is citation to the inadmissible portions of the administrative record. *See, e.g.*, Pl.'s Mem. 24 (citing to a letter sent by plaintiff's

counsel to defendant, at Admin. Rec. 229, 231-32, for the proposition that plaintiff held regular meetings in the years subsequent to the Tax Court decision in *Foundation I).*

Plaintiff relies on statements contained in Roy Masters's affidavit in order to prove that Foundation "continuously" held meetings at Tall Timber Ranch. *See* Pl.'s Mem. 24 (citing Affidavit of Roy Masters ¶¶ 4-5).[19] However, even assuming that plaintiff's meetings continued to be held at Tall Timber Ranch, this

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[19] Defendant argues against the sufficiency of statements contained in Roy Masters's affidavit. While the court agrees that plaintiff presumably could have marshalled stronger evidence in support of the arguments contained throughout its briefing, the court nevertheless relies on portions of Masters's affidavit in this Opinion which are based on the affiant's personal knowledge, and set forth facts admissible as evidence at trial. *See* 11 James Wm. Moore, *Moore's Federal Practice* (*Moore's Federal Practice*) § 56.14[1][d], at 56-162.1-163 (3d ed. 2004) ("[A]t the summary judgment stage, the focus is not on the form of the evidence as it is presented in an affidavit, but rather, whether at trial the matter stated in the affidavit would constitute admissible evidence. To be acceptable at the summary judgment stage, the evidence presented in the affidavit must be evidence that would be admissible if presented at trial through the testimony of the affiant as a sworn witness."). The court also notes that it does not rely on the portions of Masters's affidavit which the court concludes would be inadmissible at trial for a variety of reasons including statements of legal conclusions, facts which plaintiff has not established are based on the affiant's personal knowledge, and statements that contain conclusory allegations or speculation. *See id.* § 56.14[1][d], at 56-164 ("[A]n affidavit that only contains facts that could only be presented at trial through evidence that violates the proscriptions against hearsay and statements made without personal knowledge should not be admitted at the summary judgment stage."); *id.* § 56.14[1][d], at 56-166.2 ("It is within the court's discretion to strike portions of an affidavit. . . . [sic] and to preserve the portions that are competent.").

evidence is limited by the fact that it does not demonstrate the regularity, if any, with which congregants assembled together to worship. Plaintiff's affidavit evidence is too vague to prove that it has a regular congregation.

Plaintiff also relies on letters written by various individuals as "testimonial evidence of plaintiff's congregation."[20] Masters Affidavit ¶ 19 (referring to letters contained in the administrative record at Admin. Rec. 10003-352 and 11349-368); Masters Affidavit ¶ 3 (referring to Admin. Rec. 11213-23, 11246-49, 11256-65)).[21]

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[20] Defendant argues that the letters to which Roy Masters's affidavit refers are inadmissible. Def.'s Mot. 25-30. The court regards the letters as admissible, even though not in the form of affidavits, because the letters can reasonably be converted into admissible evidence at trial through the testimony of their authors. *See* 11 *Moore's Federal Practice* § 56.14[1][d], at 56-164 ("[I]f an affidavit points to the testimony of another witness or source of competent evidence, this may demonstrate the existence of sufficient evidence available at trial to defeat the summary judgment motion") (citing *Celotex v. Catrett*, 477 U.S. 317, 322-23 (1986) (admitting letter from "work supervisor who stated that plaintiff's decedent was exposed to Celotex's asbestos product" based on the work supervisor's presumed availability as a witness)). Defendant also argues that the circumstances under which the letters and declarations contained in the administrative record (Admin. Rec.) were submitted to plaintiff raise questions as to their admissibility. Def.'s Mot. 25-30. The court notes defendant's objections and takes those objections into consideration in the weight it gives to the evidence, but not as to its admissibility in the summary judgment proceeding.

[21] Plaintiff's citations to portions of the administrative record appear to be in error. In any case, the court cannot discern how those portions of the record support plaintiff's contention that it has a regular congregation. *See* Admin. Rec. 11213-23, 11246-49, 11256-65. The court takes this opportunity to address all of

The parties agree that plaintiff received approximately 300 letters from prisoners after plaintiff sent a letter to them that was signed by plaintiff's founder, Roy Masters, and dated July 5, 2005. Def.'s Facts ¶ 36; Pl.'s Resp. to Def.'s Facts 28-30. Plaintiff enclosed a postage-prepaid business reply mail envelope with the letter. *See* Def.'s Facts ¶ 36; Pl.'s Resp. to Def.'s Facts 30. The mailing read as follows:

> In order to continue serving you with radio programs and materials, we need your help to maintain our 501(c)[(3)] tax-exempt status.
>
> Would you be so kind as to write us a letter briefly explaining the value of the radio programs and the materials you have received?
>
> Please add that you consider us your church, one that you can attend in no other way by reason of your incarceration.

See Def.'s Facts ¶ 36; Pl.'s Resp. to Def.'s Facts 29 (emphasis omitted). The parties agree that the majority of responses plaintiff received to its mailing indicated that the authors of the responses listened to plaintiff's radio broadcasts. Def.'s Facts ¶ 36; Pl.'s Resp. to Def.'s Facts 29. The responses received included the following statements made by the respondents: "'I consider [Foundation] my church.'" Def.'s Facts ¶ 37; Pl.'s Resp. to Def.'s Facts 30. "[Foundation] 'is an organization with the intent of helping people in a non-profit manner. In other words a church.'" *Id.* "'[Foundation] is the closest to church I can get.'" *Id.* "[Foundation] is 'an alternative to church attendance.'" *Id.*

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the portions of the record which contain correspondence from individuals describing their relationship to Foundation.

"On or about July 12, 2005, an e-mail message entitled 'Message from Roy' was sent from email@f[h]u.com." Def.'s Facts ¶ 38; Pl.'s Resp. to Def.'s Facts 31. "[The e-mail] is addressed 'Hello Friend' and includes a description of how to unsubscribe at the end of the message." Def.'s Facts ¶ 38; Pl.'s Resp. to Def.'s Facts 31. The message states in its entirety:

> We are grateful for your continued financial support for our worldwide outreach.
>
> In order to maintain the Foundation's 501(c)[(3)] tax-exempt status (a church) we need your help.
>
> Would you be so kind as to send us a short letter confirming the value you have received from our radio broadcasts and perhaps our Sunday sessions over the internet? Please explain why you consider the Foundation your church, one that you perhaps can attend in no other way—distance forbidding.
>
> In this manner your donations will remain tax-deductible.
>
> Please write soon.

Def.'s Facts ¶ 38; Pl.'s Resp. to Def.'s Facts 31. During the two months following the e-mail message, Foundation received 686 emails and letters. Def.'s Facts ¶ 38; Pl.'s Resp. to Def.'s Facts 32. Over thirty-eight percent of the respondents used postage-prepaid business reply mail envelopes provided by plaintiff for their responses. Def.'s Facts ¶ 38; Pl.'s Resp. to Def.'s Facts 32. Twenty-two percent of the respondents replied via email. Def.'s Facts ¶ 38; Pl.'s Resp. to Def.'s Facts 32.

Responses to the mailing referenced in Def.'s Facts ¶ 38 included the following statement: "I am writing in reply to the request for 'help to maintain [Foundation's] tax-exempt status.'" Def.'s Facts ¶ 39; Pl.'s Resp. to Def.'s Facts 33. "At least [eleven] of the replies specifically mention that they are writing in response to concerns about [Foundation's] 501(c)(3) status." *Id.*

Plaintiff has also submitted as evidence declarations that plaintiff prepared which are entitled "Declaration Concerning the Foundation of Human Understanding" and were signed by at least sixty-six people in March 2002. Def.'s Facts ¶ 34; Pl.'s Resp. to Def.'s Facts 27. "The pre-printed declarations include, among other things, the statement that Foundation is the signer's 'church' and that [Foundation] has 'sponsored, directed, or conducted sacred or spiritual activities in which I have participated.'" Def.'s Facts ¶ 34; Pl.'s Resp. to Def.'s Facts 27. "Below this pre-printed language, each form had a blank space for the signer to fill in 'some of these' activities. Def.'s Facts ¶ 34; Pl.'s Resp. to Def.'s Facts 27-28. "Approximately one-third of signers listed 'services' in the space for indicating their participation in [Foundation], approximately one-third listed seminars or radio broadcasts; another third left it blank." Def.'s Facts ¶ 34; Pl.'s Resp. to Def.'s Facts 28.

The court views these letters, emails, and declarations as evidence that plaintiff has an established group of followers. A group of followers, however, is not synonymous with a "regular congregation." Plaintiff has not adduced evidence that it has formal members. In fact, plaintiff states that it "has no formal membership" and "does not require that its congregants abandon affiliations with other churches or faiths."

Pl.'s Reply 12. While a formal membership is not a prerequisite to proving the existence of an established congregation, plaintiff's letters, without more, do not advance plaintiff's argument. Although the parties agree that plaintiff has "thousands of Foundation adherents or followers who practice the meditation techniques, attend seminars, [and] read the Foundation publications," *see* Def.'s Facts ¶ 41; Pl.'s Resp. to Def.'s Facts 34 (emphasis omitted), plaintiff has not provided evidence as to the regularity, if any, with which its followers come together to practice. There is no evidence contained within the letters, emails, declarations, or, for example, in the form of records of attendance, that show a group of followers that regularly congregates in any form—whether virtually or in one another's physical presence.[22] The absence of this evidence weakens

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[22] Plaintiff has provided records of attendance from some its meetings. Pl.'s Reply Exhibit (Ex.) 1 (Supplemental Affidavit of Roy Masters) (attaching Admin. Rec. 16002-16230). This evidence, however, cannot be deployed to prove that plaintiff meets this criterion. Most importantly, the records of attendance span years that are outside of the scope of evidence at issue in this case. *See supra* Part III.B.4. Further, the attendance records are primarily from the years 2005 and 2006, at which time the church tax inquiry was complete, and defendant had already issued its final adverse determination. *See supra* Part I.B. (finding that defendant issued its final adverse determination on June 8, 2004). The attendance records are therefore unpersuasive regarding plaintiff's activities during the time period of defendant's audit. Here, as in *First Church of In Theo v. Commissioner* (*First Church of In Theo*), plaintiff provided evidence that it has a regular congregation only after plaintiff has been put on notice regarding defendant's revocation of plaintiff's church status. *First Church of In Theo*, 56 T.C.M. (CCH) 1045, 1049 (1989). Accordingly, here, as in *First Church of In Theo*, the court views with skepticism plaintiff's evidence submitted only after plaintiff's status has been revoked. *See id.* ("It was

plaintiff's attempt to meet this criterion. Moreover, there is evidence in the record that Foundation's religious practice neither requires nor promotes associational worship. Notes from an IRS interview, for example, include the following statements as to which plaintiff responded that defendant had "'accurately quoted Roy [Masters's] comments:'"

> One of Roy's major doctrines is "You don't need a church." Roy provides meditation exercises so the individuals can commune with God individual . . . One of Roy's basic premises is "Catch and Release"—come to seminars, learn the Foundation's principles, and when you can do that, you don't need Roy.

Def.'s Facts ¶ 35; Pl.'s Resp. to Def.'s Facts 28 (citing Admin. Rec. 5326, 5889).

The case law consistently concludes that "[w]hen bringing people together for worship is only an incidental part of the activities of a religious organization, those limited activities are insufficient to label the entire organization a church." *Foundation I*, 88 T.C. at 1357 (citing *De La Salle*, 195 F. Supp. at 901, and *Chapman*, 48 T.C. at 364); *see infra* Part IV.B.2.n; Part IV.B.3. The evidence before this court contrasts with the Tax Court's finding in *Foundation I* that plaintiff held multiple services per week attended by a regular group of 50 to 350 congregants. *Foundation I*, 88 T.C. at 1360. Here, plaintiff's evidence is insufficient to prove that it has a regular congregation.

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only after the second proposed adverse ruling detailing the IRS's criteria for qualification as a church that petitioner began to assert that it did in fact . . . hold regular religious services for a regular congregation . . . .").

n. Regular Religious Services[23]

Plaintiff argues that it provides regular religious services in a variety of forms including Sunday

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[23] Defendant contends that there is an absence of evidence proving that the nature of plaintiff's services are religious. *See, e.g.*, defendant's Reply for the United States in Support of Its Cross Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment (defendant's Reply or Def.'s Reply) 19 ("[T]here is a dearth of evidence that [plaintiff's radio] broadcasts are religious."); Def.'s Mot. 37 ("[P]laintiff offers no evidence that . . . its weddings are conducted as those of a church would be. . . ."). The court disagrees and finds that defendant is asking the court to assume the question in issue: what a "church" wedding looks like. The evidence in the record is sufficient to support the conclusion that plaintiff, Foundation of Human Understanding (Foundation), holds religious meetings and that its founder, Roy Masters, disseminates a message based on plaintiff's principles and beliefs. *See, e.g.*, Admin. Rec. Ex. 320B (compact discs containing recordings of Roy Masters's various radio broadcasts). Plaintiff describes the activities that take place during its Sunday meetings as follows:

> A typical service at the Tall Timber Ranch consists of a minister of the Foundation, most often Roy Masters, lecturing to a group of individuals from 10 to 30 in number concerning meditative practices, good and evil, Adam and Eve, societal hypnosis, man/woman relationships, alcoholism, child abuse and a wide variety of other topical religious themes. The minister in charge may feel inspired to perform ritual exorcisms for those individuals who are perceived by the minister to be possessed of evil influence. The service/seminar might last from one hour to three hours per session. A seminar is being held, for example, over Thanksgiving, 2001 at the ranch. The seminars/services also take place in various cities according to the travel schedule of Roy Masters or the other Foundation ministers.

Def.'s Facts ¶ 19; Pl.'s Resp. to Def.'s Facts 15. In addition, it is uncontested that plaintiff is a religious organization. Def's Mot. 5 ("The Commissioner of Internal Revenue has ruled that [p]laintiff is a religious organization described in I.R.C. § 501(c)(3)").

meetings, weddings, seminars, and radio and internet broadcasts. *See* Pl.'s Mem. 25; Pl.'s Reply 17-18.

Plaintiff's arguments suffer from two serious shortcomings.

First, its services in the form of Sunday meetings, weddings, and seminars, are not frequent enough to be characterized as "regular." *In Spiritual Outreach I*, the Tax Court found that petitioner held a total of twenty religious gatherings during the two years at issue in the case. *Spiritual Outreach I,* 1990 WL 3786, No. 23387-87X (Tax Court 1990), aff'd 927 F.2d 335 (8th Cir. 1991). Also during the two years at issue, petitioner held several retreats on the church grounds during which the participants practiced "meditation study and spiritual advancement." *Id.* A total of five wedding ceremonies were conducted in petitioner's chapel by ministers from guest churches. *Id.* The facts of this case are similar to *Spiritual Outreach I.* Foundation's ministers have conducted nine weddings in the last ten years, three of which took place after 2000. *See* Def.'s Facts ¶ 29; Pl.'s Resp. to Def.'s Facts 24. "In 1998-2000, Plaintiff offered [twenty-one] seminars at a variety of locations, five of which were in Oregon." Def.'s Facts ¶ 27; Pl.'s Resp. to Def.'s Facts 22. *In Spiritual Outreach I*, the court was unpersuaded that "musical festivals and revivals . . . and gatherings for individual meditation and prayer by persons who do not regularly come together as a congregation for such purposes" was sufficient to satisfy the "cohesiveness factor which . . . is an essential ingredient of a 'church.'" *Spiritual Outreach I*, 58 T.C.M. (CCH) at 1287.

Second, the court declines to characterize the radio and internet broadcasts as religious services. The court's conclusion is consistent with the weight

of persuasive case law. At the time of the church tax inquiry, plaintiff owned "Talk Radio Network, which syndicates and distributes radio programming, including Roy Masters's show 'Advice Line.'" Def.'s Facts ¶ 8; Pl.'s Resp. to Def.'s Facts 7. "Plaintiff regularly broadcasts its 'Advice Line' radio call-in show on over 130 stations." Def.'s Facts ¶ 8; Pl.'s Resp. to Def.'s Facts 7. "Plaintiff broadcasts to the public over the internet, and its broadcasts are available to listeners worldwide." Joint Stip. ¶ 26. "Plaintiff broadcasts its message nightly, through a radio program in which Roy Masters and other of [p]laintiff's ministers speak and preach." Joint Stip. ¶ 27. In advocating that the court consider plaintiff's radio and internet broadcasts as religious services, plaintiff's chief argument is that radio broadcasts "allow individuals to attend meetings more regularly and conveniently." Pl.'s Mem. 25. Plaintiff advances a conception of religious services which includes radio and internet broadcasts "attended" by congregants either virtually, by using the internet, or by tuning in on a radio. *Id.* at 27. Plaintiff argues that its adherents "'assemble' to receive the spiritual message," *id.* at 28, and that its message is "no less heard by the congregation than [it] would be if [it] were delivered in a room with a pulpit," *id.* at 30.

The weight of persuasive authority, further discussed below, holds that radio and internet broadcasts lack critical associational aspects characteristic of religious services and are therefore instead properly regarded simply as broadcasting and publishing services insufficient to qualify a religious organization for church status. *See, e.g.*, *Chapman*, 48 T.C. at 367 (Tannenwald, J., concurring) ("The permissible purpose may be accomplished individually and privately in the sense that oral manifestation is not necessary, but it may

not be accomplished in physical solitude."); *see infra* Part IV.B.2 (analyzing the application of the associational test to plaintiff, and discussing the various cases in which plaintiffs whose primary activities are broadcasting and publishing have not gained church status).

Moreover, plaintiff has not demonstrated that its radio and internet broadcasts accomplish the associational experience supplied by churches which people physically attend, thereby distinguishing itself from litigants in prior cases. There is no evidence, for example, that plaintiff's adherents regard their experience while listening to plaintiff's broadcasts as a shared experience with other of plaintiff's followers, or as a communal experience in any way. *See* Pl.'s Mem. *passim*; Pl.'s Reply *passim*.

Plaintiff has presented evidence that it meets some, but not all, of the fourteen criteria. Therefore, here, as in *Foundation I*, viewed in light of the fourteen criteria alone, this case "presents a close question." *See Foundation I*, 88 T.C. at 1361. However, record evidence demonstrates that during the course of the church tax inquiry, plaintiff's activities no longer involved the associational characteristics which were critical to convincing the Tax Court to grant church status to Foundation in 1987. Therefore, plaintiff's quest for qualification as a "church" described in § 170(b)(1)(A)(i) of the Code falters on the associational test.

2. The Associational Test

To qualify as a church, "an organization must serve an associational role in accomplishing its religious purpose." *Church of Eternal Life*, 86 T.C. at 924. The associational test is a "threshold" standard which

religious organizations must satisfy in order to obtain church status. *Id.* In creating the associational standard, the United States District Court for the District of Columbia stated that demonstrating associational aspects is the "minimum" requirement necessary for a religious organization to gain church status. *American Guidance*, 490 F. Supp. at 306.

During the tax years in question, Foundation's activities were similar to the activities of those plaintiffs whose suits for church status were unsuccessful primarily because their activities lacked the associational aspects which convinced the Tax Court to grant church status to Foundation in its prior declaratory judgment action. *Foundation I*, 88 T.C. at 1361 (finding the decision to grant church status to be a "close question"). Although not binding, the court finds persuasive the analysis of the Tax Court in *Foundation I*. In addition, subsequent Tax Court decisions which rely upon *Foundation I* clarify the factors which were critical to the court's decision in *Foundation I*.

In explaining its rejection of plaintiff's declaratory judgment action in *VIA*, the Tax Court summarized the key characteristics exhibited by plaintiff in *Foundation I* which were sufficient to support recognition of church status: plaintiff conducted services "three to four times a week by ordained ministers for congregations of no less than 50 to 300 members[;] [Foundation] ministers were ordained only after having completed a three-year apprenticeship under the tutelage of [Foundation's] founder and leader[;] [and] Foundation operated a regular school for children in which the teaching of [Foundation] principles formed part of the curriculum." *VIA*, 68 T.C.M. (CCH) at 216 (describing plaintiff's characteristics essential

to meeting the associational standard in *Foundation I*). There is no evidence in the record presently before the court in this case to show that the distinguishing characteristics of plaintiff in *Foundation I*, as delineated by the Tax Court in *VIA*, continue to exist. *See supra* Part IV.B.1.a-n. In fact, the evidence before the court shows that plaintiff's primary activities are those which caused the most concern for the Tax Court in *Foundation I* and subsequent cases. In *VIA*, the resemblance between plaintiff in *VIA* and *Foundation I* which cut against the plaintiff in *VIA* was the plaintiff's use of the mass media and commercial activities. *VIA*, 68 T.C.M [sic] (CCH) at 216. The court noted that Foundation's use of mass media and commercial activities in order to spread its beliefs, including radio broadcasts, a magazine, and the sale of audio tapes and books, were "of concern" to the court in *Foundation I*. *Id*. It appears that the Tax Court decision relied on the fact that Foundation also exhibited "associational aspects" which were "much more than incidental" when the court recognized plaintiff in *Foundation I* as a church. *Foundation I*, 88 T.C. at 1361. The evidence now before the court presents a picture of Foundation that resembles the plaintiff in *VIA* much more closely than it resembles the plaintiff described in the court's findings in *Foundation I*. Plaintiff no longer provides religious services to an established congregation. *See supra* Part IV.B.1.m-n. Plaintiff's primary activities are internet and radio broadcasting, activities which are no longer supplemented by the associational activities in existence at the time of the Tax Court's decision in *Foundation I*. *See supra* Part IV.B.1.n (discussing the irregularity of plaintiff's Sunday meetings, seminars and weddings). The court in *VIA* stated that VIA, unlike plaintiff in *Foundation I*, exhibited a form of

worship which was only incidental to petitioner's other activities, and was therefore insufficient to obtain church status. *VIA*, 68 T.C.M [sic] (CCH) at 216.

In *Spiritual Outreach I*, the Tax Court entertained a declaratory judgment action in which petitioner contested the IRS's initial determination that petitioner did not qualify as a church under I.R.C. §§ 509(a)(1) and 170(b)(1)(A)(i). *Spiritual Outreach I*, 58 T.C.M. (CCH) at 1284. The court held that petitioner failed to satisfy the associational test. *Id.* at 1287. In that case, petitioner maintained an outdoor amphitheater on its grounds at which petitioner held bimonthly musical programs. *Id.* at 1286. Petitioner held a total of twenty gatherings during the two years at issue in the case. *Id.* at 1287. The musical programs always included congregational singing, and opened and closed with a prayer facilitated by a minister. *Id.* Also during the two years at issue, petitioner held several retreats on the church grounds "wherein followers of different religions met for the purpose of meditation study and spiritual advancement." *Id.* A total of five wedding ceremonies were conducted in petitioner's chapel by ministers from guest churches. *Id.* The court was unpersuaded that "musical festivals and revivals . . . and gatherings for individual meditation and prayer by persons who do not regularly come together as a congregation for such purposes" was sufficient to satisfy the "cohesiveness factor which . . . is an essential ingredient of a 'church.'" *Id.* The court distinguished petitioner in *Spiritual Outreach I* from plaintiff in *Foundation I*, describing the associational factor as "critical." *Id.* The court stated that the presence of the associational factor in *Foundation I* was essential to resolving what was a "close question" in that case. *Id.* The

record before the court describes an organization similar to the petitioner in *Spiritual Outreach I*, and is therefore similarly distinguishable from plaintiff's record presented in *Foundation I*. *See supra* Part IV.B.1.m-n.

In *Church of Eternal Life*, the court held that plaintiff failed the threshold associational test based on a finding that petitioner's principal activities included "the operation of a library containing about 4,000 items, bi-monthly meetings, the distribution of literature, the sale of merchandise and the publication of a newsletter." *Church of Eternal Life*, 86 T.C. at 921. Based on the court's factual findings in this opinion, Foundation is an institution that closely resembles the plaintiff in *Church of Eternal Life*. Foundation similarly fails to satisfy the associational standard. *See supra* Part IV.B.1.m-n.

Here, as in *First Church of In Theo*, plaintiff is a "self-described non-membership organization" whose "religious purposes were accomplished through the writing, publishing, and distribution of religious literature rather than through the regular assembly of a group of believers to worship together." *First Church of In Theo*, 56 T.C.M. (CCH) at 1049. In addition to failing to meet most of the fourteen criteria, the court in *First Church of In Theo* also concluded that plaintiff "fail[ed] to satisfy the threshold criteria of communal activity necessary for a church." *Id.* Accordingly, here, as in *First Church of In Theo*, the court finds that plaintiff is not a church within the meaning of § 170(b)(1)(A)(i) as interpreted by the weight of persuasive authority.

Because plaintiff no longer exhibits the associational characteristics which were critical to convincing the Tax Court to grant church status to Foundation in

1987, what may have been a "close question" on the facts before the court in *Foundation I* is more readily determinable in this case.[24]

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[24] In response to the court's request for additional briefing in its May 18, 2009 Order, dkt. no. 72, Plaintiff's Supplemental Brief on Issues Raised by the Court (plaintiff's Supplemental Brief or Pl.'s Supp. Br.) urges that plaintiff's case is similar to the facts presented in *Purnell v. Commissioner* (*Purnell*), 63 T.C.M. (CCH) 3037 (1992), in which the religious organization discussed by the Tax Court was determined to satisfy the associational test. Pl.'s Supp. Br. 6-7. *Purnell*, however, is distinguishable from this case, both procedurally and substantively. First, as plaintiff acknowledges, *Purnell* was not a declaratory judgment case. *Id.* at 6; *see Purnell*, 63 T.C.M. (CCH) at 3037-2. In fact, the religious organization discussed in *Purnell*, the Kingdom of God Headquarters Church (Kingdom), was not a party to the action. *Id.* The central issue presented to the Tax Court in *Purnell* involved the deductibility of charitable contributions made by individuals to Kingdom. *Id.* Here, in contrast, the religious organization is the plaintiff bringing suit, and the central issue before this court is plaintiff's entitlement to a declaratory judgment based on its tax exempt classification. The facts in *Purnell* are distinguishable from plaintiff's facts in the present case. In *Purnell*, the court found that the religious organization satisfied the associational test after finding that Kingdom met several of the fourteen criteria, including having "*both* regular and irregular congregations" and conducting regular religious services. *Id.* at 3037-4 (emphasis added). In *Purnell*, the organization's activities in "various public spaces" at which the organization's founder preached "to anyone [who he could] interest in the message," led the Tax Court to describe the religious organization as a "church without walls." *Id.* at 3037-3. Plaintiff urges that Foundation is similarly a "church without walls." Pl.'s Supp. Br. 7. The activities described in *Purnell*, however, were undertaken by the organization *in addition to* the organization's regular religious services provided to its regular congregation. *Purnell*, 63 T.C.M. (CCH) at 3037-3. Evidence of plaintiff's radio ministry is insufficient to persuade the court to conclude that plaintiff is analogous to the religious organization discussed in *Purnell* and therefore satisfies the associational test.

The extent to which Foundation brings people together to worship is incidental to its main function which consists of a dissemination of its religious message through radio and internet broadcasts, coupled with written publications. "When bringing people together for worship is only an incidental part of the activities of a religious organization, those limited activities are insufficient to label the entire organization a church." *See Foundation I,* 88 T.C. at 1357.

V. Conclusion

For the foregoing reasons, plaintiff's Motion is DENIED, and defendant's Motion is GRANTED.

The Clerk of Court shall ENTER JUDGMENT for defendant. No costs.

IT IS SO ORDERED.

s/ Emily C. Hewitt
EMILY C. HEWITT
Chief Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2009-5129

FOUNDATION OF HUMAN UNDERSTANDING,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 04-CV-1441, Chief Judge Emily C. Hewitt.

Decided: August 16, 2010

MARC K. SELLERS, SCHWABE WILLIAMSON & WYATT, PC, of Portland, Oregon, argued for plaintiff-appellant. With him on the brief was DAN ELLER.

KENNETH L. GREENE, Attorney, Appellate Section, Tax Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief were JOHN A. DICICCO, Acting Assistant Attorney General, and ELLEN PAGE DELSOLE, Attorney.

Before LOURIE, BRYSON, and GAJARSA, *Circuit Judges*. BRYSON, *Circuit Judge*.

The Foundation of Human Understanding ("the Foundation"), which describes itself as "based upon Judeo-Christian beliefs and the doctrine and teachings of its founder, Roy Masters," challenges a decision of the United States Court of Federal Claims that the Foundation did not qualify as a "church" under section 170(b)(1)(A)(i) of the Internal Revenue Code ("I.R.C."), 26 U.S.C. § 170(b)(1)(A)(i), for the period from January 1, 1998, through December 31, 2000. We affirm.

I

The Foundation is a nonprofit corporation that was incorporated in 1963. The Internal Revenue Service ("IRS") first recognized the Foundation's tax-exempt status under I.R.C. § 501(c)(3) in 1965. In 1970, the Foundation filed Form 4653, entitled "Notification Concerning Foundation Status," in which it represented to the IRS that it was not a private foundation under I.R.C. § 509(a)(1) because it qualified as a church under I.R.C. § 170(b)(1)(A)(i). The IRS agreed that the Foundation was not a private foundation, but only because the Foundation qualified as a publicly supported organization under I.R.C. § 170(b)(1)(A)(vi).

The Foundation subsequently renewed its request for a ruling from the IRS that it qualified as a church under section 170. The IRS denied that request in 1983. The Foundation responded by filing an action before the United States Tax Court in which it sought a declaratory judgment that it qualified as a church. The Tax Court ruled in favor of the Foundation, relying principally on the following facts: (1) the Foundation owned a building in Los Angeles, Cali-

fornia, where it conducted services "three or four times a week"; (2) the Foundation operated Brighton Academy, "a school for children" that instructed its students in the teachings of the Foundation; (3) the Foundation purchased the Tall Timber Ranch in Selma, Oregon, where it conducted seminars, meetings, and other activities; (4) the Foundation purchased a church building in Grants Pass, Oregon, and conducted services there; and (5) the Foundation provided "regular religious services for established congregations [consisting of 50 to 350 persons] that [were] served by an organized ministry." *Foundation of Human Understanding v. Comm'r* (*Foundation I*), 88 T.C. 1341, 1347-49, 1359 (1987). The Tax Court recognized that the Foundation devoted substantial resources to disseminating its message through radio broadcasts and printed pamphlets, activities that did not support its claim to church status. The court held, however, that those broadcasting and publishing activities did not "overshadow the other indications that petitioner is a church." *Id.* at 1360.

In the years following the Tax Court's decision, the Foundation underwent several changes. First, in 1991, Brighton Academy was separately incorporated and began to operate as a "private non-denominational Christian school" rather than a school based on the Foundation's doctrines. Next, during the mid-1990s, the Foundation sold its buildings in Los Angeles and Grants Pass, and, in the late 1990s, meetings at the Tall Timber Ranch became less frequent. The Foundation, however, continued to disseminate its messages through broadcast and print media, and it began to use the Internet for the same purpose.

In 2001, the IRS began a church-tax inquiry for the period from January 1, 1998, through December 31,

2000. At the conclusion of that inquiry, the IRS determined that while the Foundation was entitled to retain its tax-exempt status under section 501(c)(3), its church status under section 170 would be revoked.[1] The Foundation challenged that decision by filing the present action, seeking a declaratory judgment in the United States Court of Federal Claims pursuant to 26 U.S.C § 7428. Both parties moved for summary judgment. The court granted judgment to the government in a thorough and carefully reasoned opinion on which we substantially rely. *Foundation of Human Understanding v. United States* (*Foundation II*), 88 Fed. Cl. 203 (2009).

The trial court placed the burden of proof on the Foundation to demonstrate its status as a church and restricted the scope of evidence to the Foundation's activities during the audit years of 1998 through 2000. The court then identified the two main analytical approaches that have been used to determine whether an institution is a "church" under section 170: a set of 14 criteria devised by the IRS,[2] and the so-called

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[1] The IRS made clear that, even without church status under section 170, the Foundation qualified as a "religious organization" under I.R.C. § 501(c)(3) and therefore would not lose its tax-exempt status. A "religious organization" that does not enjoy "church" status is required to file informational returns with the IRS under I.R.C. § 6033, and the IRS has broader authority to investigate such an organization's activities. *See Spiritual Outreach Soc'y v. Comm'r*, 927 F.2d 335, 337 n.2 (8th Cir. 1991); *Church of Spiritual Tech. v. United States*, 26 Cl. Ct. 713, 731 n.37 (1992) ("[C]hurches may be investigated by the IRS only in accordance with strict and specific procedures specified in I.R.C. § 7611.").

[2] The 14 criteria have their origin in a 1979 speech by the IRS Commissioner, and the IRS has subsequently applied those factors in its section 170 determinations. *See Foundation I*, 88 T.C. at 1357. The 14 criteria are: (1) a distinct legal existence;

"associational test" adopted by several courts. The court expressed concern about the "14 criteria" approach on the ground that it "appears to favor some forms of religious expression over others in a manner in which, if not inconsistent with the letter of the Constitution, the court finds troubling when considered in light of the constitutional protections of the Establishment and Free Exercise Clauses." *Foundation II*, 88 Fed. Cl. at 217. Nonetheless, the court looked to the 14 criteria for guidance and found that the Foundation satisfied some, but not all, of those criteria. For example, the court found that the Foundation had not established that it had a regular congregation or that it held regular services during the years at issue.

Even though the trial court referred to the 14 criteria in the course of its factual findings, it ultimately decided the case by applying the associational test, which defines a church as an organization that includes a body of believers who assemble regularly for communal worship. Specifically, the court found that the Foundation did not provide regular religious services to an established congregation and concluded that "[t]he extent to which [the] Foundation brings

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(2) a recognized creed and form of worship; (3) a definite and distinct ecclesiastical government; (4) a formal code of doctrine and discipline; (5) a distinct religious history; (6) a membership not associated with any other church or denomination; (7) an organization of ordained ministers; (8) ordained ministers selected after completing prescribed studies; (9) a literature of its own; (10) established places of worship; (11) regular congregations; (12) regular religious services; (13) Sunday schools for religious instruction of the young; and (14) schools for the preparation of its ministers. The IRS also considers "any other facts and circumstances which may bear upon the organization's claim for church status." *Id.* at 1357-58.

people together to worship is incidental to its main function" of spreading its message through publication and broadcasting. *Foundation II*, 88 Fed. Cl. at 234. Relying on case law that treats publishing activities as insufficient to confer church status and denies church status to entities whose associational activities are merely incidental to their publishing and broadcasting activities, the trial court held that the Foundation did not qualify as a church under section 170. The Foundation appeals that decision.

II

Neither Congress nor the IRS has provided much guidance as to the meaning of the term "church" in I.R.C. § 170 or what is required for an institution to qualify for that designation. As the trial court observed, neither the statute nor any IRS regulation defines that statutory term. *See Foundation II*, 88 Fed. Cl. at 218; *Am. Guidance Found. v. United States*, 490 F. Supp. 304, 306 (D.D.C. 1980) (Congress has offered "virtually no guidance" as to what it meant by the term "church" in section 170.).

Nevertheless, some degree of consensus has emerged from court decisions. First, those courts that have addressed the issue largely agree that "Congress intended a more restricted definition for a 'church' than for a 'religious organization.'" *Church of the Visible Intelligence that Governs the Universe v. United States*, 4 Cl. Ct. 55, 64 (1983); *see also Am. Guidance*, 490 F. Supp. at 306; *Chapman v. Comm'r*, 48 T.C. 358, 363 (1967) ("every religious organization is not per se a church"). Thus, as in this case, an entity that engages in religious teaching may be a "religious organization" but still not qualify as a "church" for purposes of section 170. Second, as several courts have noted, "[t]he means by which an avowedly religious

purpose is accomplished [is what] separates a 'church' from other forms of religious enterprise." *Spiritual Outreach Soc'y v. Comm'r*, 927 F.2d 335, 339 (8th Cir. 1991); *Am. Guidance*, 490 F. Supp. at 306; *First Church of In Theo v. Comm'r*, 56 T.C.M. (CCH) 1045 (1989); *see also United States v. Jeffries*, 854 F.2d 254, 258 (7th Cir. 1988) (an established congregation, regular religious services, and dissemination of a doctrinal code "help distinguish a church from some other form of religious enterprise"). Third, the courts have relied mainly on the IRS's 14 criteria and on the associational test when addressing the distinction between a religious organization and a church under section 170.

With respect to the 14 criteria, we share the concerns expressed by the trial court and note that courts have generally declined to accept the 14 criteria as a definitive test for whether an institution qualifies as a church. *See, e.g., Foundation I*, 88 T.C. at 1358; *Spiritual Outreach*, 927 F.2d at 339 (treating the 14 criteria as "a guide, helpful in deciding what constitutes a church"). Moreover, even those cases that rely on the 14 criteria apply them flexibly, recognizing that "the IRS does not give controlling weight to any one [of the 14 criteria]," *Visible Intelligence*, 4 Cl. Ct. at 64; *see also Foundation I*, 88 T.C. at 1350 ("These criteria are not exclusive and are not mechanically applied, but, rather, serve as a list of some of the characteristics that may be used in determining whether an organization is a church . . . .").

Courts have been more receptive to the associational test as a means of determining church status under section 170. *See, e.g., Church of Eternal Life & Liberty, Inc. v. Comm'r*, 86 T.C. 916, 924 (1986) ("To qualify as a church an organization must serve an

associational role in accomplishing its religious purposes."); *Am. Guidance*, 490 F. Supp. at 306 ("At a minimum, a church includes a body of believers or communicants that assembles regularly in order to worship."); *Visible Intelligence*, 4 Cl. Ct. at 65; *VIA v. Comm'r*, 68 T.C.M. (CCH) 212 (1994); *Foundation I*, 88 T.C. at 1357; *Church of Spiritual Tech. v. United States*, 26 Cl. Ct. 713, 730-31 n.36 (1992); *Spiritual Outreach Soc'y v. Comm'r.*, 58 T.C.M. (CCH) 1284 (1990), *aff'd*, 927 F.2d 335 (8th Cir. 1991) ("[A] church is a cohesive group of individuals who join together to accomplish the religious purposes of mutually held beliefs."); *Chapman v. Comm'r*, 48 T.C. at 367 (Tannenwald, J., concurring) ("In my opinion, the word 'church' implies that an otherwise qualified organization bring[s] people together as the principal means of accomplishing its purpose."); *see also Spiritual Outreach*, 927 F.2d at 338 (noting the Tax Court's holding that the organization "failed to fulfill an associational requirement" but resolving the case without reaching "the associational requirement issue").

We agree that the associational test is an appropriate test for determining church status under section 170, although we recognize that the associational test and the "14 criteria test" substantially overlap; as courts have pointed out, among the most important of the 14 criteria are the requirements of "regular congregations" and "regular religious services." *See Spiritual Outreach*, 927 F.2d at 339; *Am. Guidance*, 490 F. Supp. at 306. Thus, whether applying the associational test or the 14 criteria test, courts have held that in order to be considered a church under section 170, a religious organization must create, as part of its religious activities, the opportunity for members to develop a fellowship by worshipping

together. *See Church of Eternal Life*, 86 T.C. at 924 ("A church is a coherent group of individuals and families that join together to accomplish the religious purposes of mutually held beliefs. In other words, a church's principal means of accomplishing its religious purposes must be to assemble regularly a group of individuals related by common worship and faith.").

The Foundation asserts that a religious organization should be treated as a church under section 170 as long as "there is a body of followers beyond the scope of a 'family church' . . . [who] seek the teachings of the organization and express or acknowledge an affiliation with its religious tenets." However, every religious organization has members who express an affiliation with the organization's tenets. For that reason, the Foundation's approach is at odds with the generally accepted principle that Congress intended a more restricted definition for a "church" than for a religious organization, especially in light of case law interpreting section 170 to require more than mere affiliation by a number of people with an organization espousing a particular belief system. *See, e.g., Spiritual Outreach*, 927 F.2d at 339; *VIA*, 68 T.C.M. (CCH) 212.

Therefore, in order to qualify as a church under section 170, the Foundation was required to establish that it met the associational test during the years at issue.[3] The trial court held that the Foundation failed to carry that burden. For the reasons given below, we agree with the court's conclusion.

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[3] Because the IRS ruled that the Foundation qualified as a "religious organization" for purposes of I.R.C. § 501(c)(3), the Foundation did not need to establish the sincerity or legitimacy of its religious beliefs.

III

The Foundation does not dispute that it had the burden to establish that the IRS's revocation was erroneous. *See St. Matthew Publ'g v. United States*, 41 Fed. Cl. 142, 145-46 (1998); *see also Visible Intelligence*, 4 Cl. Ct. at 65. The trial court held that the Foundation failed to satisfy that burden because it did not establish that it held regular services with a regular congregation during the years at issue and because its "electronic ministry" did not satisfy the associational test. The Foundation challenges the trial court's rulings on both of those issues.

A

With respect to the Foundation's in-person services, the record shows that during the three-year audit period at issue the Foundation did not hold regular services at any location, including its facility at the Tall Timber Ranch in Selma, Oregon. During that period, the Foundation held 21 seminars in various locations throughout the United States, five of which took place at the Tall Timber Ranch. We agree with the government that the evidence regarding the seminars does not establish that the Foundation conducted regular meetings or had a regular congregation and therefore does not satisfy the associational test. First, the attendance of groups of people at occasional seminars in cities scattered across the country does not constitute a regular assembly of a cohesive group of people for worship. Second, as for the seminars at the Tall Timber Ranch, the Foundation has not shown that those five meetings in a three-year period enabled congregants to establish a community of worship. While the associational test does not demand that religious gatherings be held with a particular frequency or on a particular

schedule, it does require gatherings that, by virtue of their nature and frequency, provide the opportunity for members to form a religious fellowship through communal worship. *See Spiritual Outreach*, 58 T.C.M. (CCH) at 1287 (evidence of 20 meetings over two years comprising "music festivals and revivals . . . involving principally gospel singing . . . and gatherings for individual meditation and prayer by persons who do not regularly come together as a congregation for such purposes" did not establish "the cohesiveness factor which we think is an essential ingredient of a 'church'"). The Foundation has failed to show that the sporadic meetings conducted in various locations were sufficiently regular to satisfy that requirement. Moreover, the Foundation has presented no evidence regarding attendance or any other indication that a regular congregation gathered even for those occasional meetings during the three-year period at issue.

The Foundation points to a number of letters from individuals stating that they had received the Foundation's teachings and considered the Foundation to be their church. However, that evidence does not identify those who attended in-person meetings as opposed to those who received the Foundation's teachings through its electronic ministry. The evidence of attendance at Foundation meetings or services is thus insufficient to satisfy the associational test because it does not establish the frequency or nature of the meetings, the consistency of the congregation, or the extent to which those meetings enabled members to associate with each other in worship,

In sum, the record supports the trial court's finding that the in-person services conducted during the years in question were merely incidental to the Foundation's primary purposes, and were therefore

insufficient to demonstrate that the Foundation was a "church" for tax purposes. *See Foundation I*, 88 T.C. at 1357 ("When bringing people together for worship is only an incidental part of the activities of a religious organization, those limited activities are insufficient to label the entire organization a church."). Accordingly, we uphold the trial court's decision on that issue.

B

With respect to its "electronic ministry," the Foundation asserts that its members regularly assembled to worship as a "virtual congregation" by listening to sermons broadcast over the radio and the Internet at set times, referred to as "appointments to listen." However, disseminating religious information, whether through print or broadcast media, does not fulfill the associational role required to qualify as a "church" under section 170. *See First Church of In Theo*, 56 T.C.M. (CCH) 1045; *VIA*, 68 T.C.M. (CCH) 212; *Church of Eternal Life*, 86 T.C. at 921; *see also Foundation I*, 88 T.C. at 1360. The fact that all the listeners simultaneously received the Foundation's message over the radio or the Internet does not mean that those members associated with each other and worshiped communally. As the trial court observed, "[t]here is no evidence . . . that [the Foundation's] adherents regard their experience while listening to [the Foundation's] broadcasts as a shared experience with other . . . followers, or as a communal experience in any way." *Foundation II*, 88 Fed. Cl. at 232.

The Foundation argues that it satisfied the associational test because its electronic ministry included a "call-in" show that enabled individuals to call and interact with the Foundation's clergy over the telephone. Those conversations, according to the

Foundation, were broadcast to listening congregants and subsequently transcribed for distribution. However, a call-in show, like other forms of broadcast ministry, does not provide individual congregants with the opportunity to interact and associate with each other in worship, and it therefore does not provide a basis for concluding that the Foundation's religious activities satisfied the associational test.

The Foundation relies on *Purnell v. Commissioner*, 63 T.C.M. (CCH) 3037 (1992), for the proposition that its broadcasting activities qualified it as a "church without walls." In *Purnell*, however, the court found that the organization in question had regular congregations and regular services. The fact that the organization also served an irregular congregation by operating in part as a "street church" did not diminish its standing as a church under section 170. Under *Purnell*, if an organization holds regular services with a regular congregation, it satisfies the associational test even if it also undertakes other activities, such as broadcasting, that would not qualify under the associational test if considered alone. *See Foundation I*, 88 T.C. at 1357. In this case, by contrast, the Foundation has not established that it held regular services with a regular congregation. *Purnell* therefore provides no support for the Foundation's argument.

Because the Foundation failed to establish that, during the three-year period at issue, it qualified as a "church" within the meaning of I.R.C. § 170, we uphold the trial court's decision sustaining the IRS's ruling.

Each party shall bear its own costs for this appeal.

AFFIRMED

APPENDIX D

26 USCS § 170

§ 170. Charitable, etc., contributions and gifts

(a) Allowance of deduction.

(1) General rule. There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary.

(2) Corporations on accrual basis. In the case of a corporation reporting its taxable income on the accrual basis, if—

(A) the board of directors authorizes a charitable contribution during any taxable year, and

(B) payment of such contribution is made after the close of such taxable year and on or before the 15th day of the third month following the close of such taxable year, then the taxpayer may elect to treat such contribution as paid during such taxable year. The election may be made only at the time of the filing of the return for such taxable year, and shall be signified in such manner as the Secretary shall by regulations prescribe.

3) Future interests in tangible personal prop-

For purposes of this section, payment of a charitable contribution which consists of a future interest in tangible personal property shall be treated as made only when all intervening interests in, and rights to the actual possession or enjoyment of, the property have expired or are held by persons other than the taxpayer or those standing in a relationship to the taxpayer described in section 267(b) or 707(b)

[26 USCS § 267(b) or 707(b)]. For purposes of the preceding sentence, a fixture which is intended to be severed from the real property shall be treated as tangible personal property.

(b) Percentage limitations.

(1) Individuals. In the case of an individual, the deduction provided in subsection (a) shall be limited as provided in the succeeding subparagraphs.

(A) General rule. Any charitable contribution to—

(i) a church or a convention or association of churches,

(ii) an educational organization which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on,

(iii) an organization the principal purpose or functions of which are the providing of medical or hospital care or medical education or medical research, if the organization is a hospital, or if the organization is a medical research organization directly engaged in the continuous active conduct of medical research in conjunction with a hospital, and during the calendar year in which the contribution is made such organization is committed to spend such contributions for such research before January 1 of the fifth calendar year which begins after the date such contribution is made,

(iv) an organization which normally receives a substantial part of its support (exclusive of income received in the exercise or performance by such organization of its charitable, educational, or other

purpose or function constituting the basis for its exemption under section 501(a) [26 USCS § 501(a)]) from the United States or any State or political subdivision thereof or from direct or indirect contributions from the general public, and which is organized and operated exclusively to receive, hold, invest, and administer property and to make expenditures to or for the benefit of a college or university which is an organization referred to in clause (ii) of this subparagraph and which is an agency or instrumentality of a State or political subdivision thereof, or which is owned or operated by a State or political subdivision thereof or by an agency or instrumentality of one or more States or political subdivisions,

(v) a governmental unit referred to in subsection (c)(1),

(vi) an organization referred to in subsection (c)(2) which normally receives a substantial part of its support (exclusive of income received in the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501(a) [26 USCS § 501(a)] from a governmental unit referred to in subsection (c)(1) or from direct or indirect contributions from the general public,

(vii) a private foundation described in subparagraph (F), or

(viii) an organization described in section 509(a)(2) or (3) [26 USCS § 509(a)(2) or (3)], shall be allowed to the extent that the aggregate of such contributions does not exceed 50 percent of the taxpayer's contribution base for the taxable year.

(B) Other contributions. Any charitable contribution other than a charitable contribution to which

subparagraph (A) applies shall be allowed to the extent that the aggregate of such contributions does not exceed the lesser of—

(i) 30 percent of the taxpayer's contribution base for the taxable year, or

(ii) the excess of 50 percent of the taxpayer's contribution base for the taxable year over the amount of charitable contributions allowable under subparagraph (A) (determined without regard to subparagraph (C)).

If the aggregate of such contributions exceeds the limitation of the preceding sentence, such excess shall be treated (in a manner consistent with the rules of subsection (d)(1)) as a charitable contribution (to which subparagraph (A) does not apply) in each of the 5 succeeding taxable years in order of time.

APPENDIX E

26 USCS § 509

§ 509. Private foundation defined.

(a) General rule. For purposes of this title, the term "private foundation" means a domestic or foreign organization described in section 501(c)(3) [26 USCS § 501(c)(3)] other than—

(1) an organization described in section 170(b)(1)(A) [26 USCS § 170(b)(1)(A)] (other than in clauses (vii) and (viii);

(2) an organization which—

(A) normally receives more than one-third of its support in each taxable year from any combination of—

(i) gifts, grants, contributions, or membership fees, and

(ii) gross receipts from admissions, sales of merchandise, performance of services, or furnishing of facilities, in an activity which is not an unrelated trade or business (within the meaning of section 513 [26 USCS § 513]), not including such receipts from any person, or from any bureau or similar agency of a governmental unit (as described in section 170(c)(1) [26 USCS § 170(c)(1)]), in any taxable year to the extent such receipts exceed the greater of $ 5,000 or 1 percent of the organization's support in such taxable year, from persons other than disqualified persons (as defined in section 4946 [26 USCS § 4946]) with respect to the organization, from governmental units described in section 170(c)(1) [26 USCS § 170(c)(1)], or from organizations described in section 170(b)(1)(A) [26 USCS § 170(b)(1)(A)] (other than in clauses (vii) and (viii)), and

(B) normally receives not more than one-third of its support in each taxable year from the sum of—

(i) gross investment income (as defined in subsection (e)) and

(ii) the excess (if any) of the amount of the unrelated business taxable income (as defined in section 512 [26 USCS § 512]) over the amount of the tax imposed by section 511 [26 USCS § 511];

(3) an organization which—

(A) is organized, and at all times thereafter is operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more specified organizations described in paragraph (1) or (2),

(B) is—

(i) operated, supervised, or controlled by one or more organizations described in paragraph (1) or (2),

(ii) supervised or controlled in connection with one or more such organizations, or

(iii) operated in connection with one or more such organizations, and

(C) is not controlled directly or indirectly by one or more disqualified persons (as defined in section 4946 [26 USCS § 4946]) other than foundation managers and other than one or more organizations described in paragraph (1) or (2); and

(4) an organization which is organized and operated exclusively for testing for public safety.

For purposes of paragraph (3), an organization described in paragraph (2) shall be deemed to include

an organization described in section 501(c)(4), (5), or (6) [26 USCS § 501(c)(4), (5), or (6)] which would be described in paragraph (2) if it were an organization described in section 501(c)(3) [26 USCS § 501(c)(3)].

* * * *